Supreme Court, U.S.
FILED

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NO. ____

IN THE SUPREME COURT OF THE UNITED STATES

October 1994 Term

SOCIÉTÉ DE BANQUE PRIVÉE, f/k/a SAUDI EUROPEAN BANK, S.A., a French Company, now known as Société d'Analyses et d'Etudes Bretonneau,

Petitioner,

v.

RESOLUTION TRUST CORPORATION, as conservator for Lincoln Savings and Loan, F.A., a Federal savings and loan association,

Respondent.

Petition for Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

Petition for Writ of Certiorari

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QUESTIONS PRESENTED

Whether a defendant moving for summary judgment can satisfy its initial burden under Federal Rule of Civil Procedure 56 of showing there are no triable issues of fact by submitting nothing more than a conclusory, unsupported statement that plaintiff has no evidence to prove its case.

Whether a district court's granting of a motion for summary judgment pursuant to the District of Arizona's Local Rule 11(i), which provides that the failure to serve and file an opposition may be deemed consent to granting the motion summarily, is consistent with due process when the defendant-movant has submitted nothing in support of the motion other than a conclusory, unsupported statement that plaintiff has no evidence to prove its case.

PARTIES

Petitioner Société d'Analyses et d'Etudes Bretonneau is a French corporation. Petitioner was formerly known, and named in this lawsuit, as Société de Banque Privée. Before that, it was known as Saudi European Bank. Petitioner is referred to hereafter as "Bretonneau." Bretonneau was defendant and counterclaimant below, and seeks review of the Court of Appeals' affirmance of summary judgment entered against it on its counterclaim. Thus, as to the questions presented, counterclaimant Bretonneau is plaintiff.

Respondent is Resolution Trust Corporation ("RTC"), who brought suit below as conservator for Lincoln Savings and Loan, F.A., a Federal savings and loan association. As to the questions presented, RTC is defendant.

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OPINIONS AND OTHER MATERIALS BELOW

The Court of Appeals opinion is unreported and is reprinted as Appendix A to this petition. The order denying a petition for rehearing is reprinted as Appendix B. The first order of the District Court granting summary judgment in favor of RTC is reprinted as Appendix C. The District Court's order vacating summary judgment is reprinted as Appendix D. Reprinted as Appendix E is the District Court's minute order stating that Bretonneau's motion to amend order vacating summary judgment had been granted. Reprinted as Appendix F is the District Court clerk's correction of its minute order, reflecting that Bretonneau's motion to amend order vacating summary judgment was in fact denied. RTC's memorandum of points and authorities in support of its motion for summary judgment is reprinted as Appendix G. The District Court's second order granting summary judgment in favor of RTC is reprinted as Appendix H.

JURISDICTION

The judgment of the Court of Appeals was entered on March 15, 1994. A timely petition for rehearing was denied by

order entered on May 3, 1994. This petition for a writ of certiorari is timely brought within 90 days thereafter pursuant to Rule 13, paragraphs .1 and .4, Rules of the Supreme Court of the United States. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

FEDERAL PROVISIONS INVOLVED

The federal provisions involved are paragraph (c) of Federal Rule of Civil Procedure 56 and Rule 11(i) of the United States District Court, District of Arizona, which are set forth infra. The entire text of Rule 56 is set forth in Appendix I.

Federal Rule of Civil Procedure 56 provides in relevant part:

> (c) **Motion and Proceedings Thereon.** The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

Rule 11(i) of the United States District Court, District of Arizona, provides:

> (i) Briefs or Memoranda of Law; Effect of Non-Compliance. If a motion does not conform in all substantial respects with the requirements of this Rule, or if the opposing party does not serve and file the required answering memoranda, or if counsel for any party fails to appear at the time and place assigned for oral argument, such non-compliance may be deemed a consent to the denial or granting of the motion and the court may dispose of the motion summarily.

STATEMENT OF THE CASE

In 1989 French banking authorities[1] interceded to prevent the collapse of Saudi European Bank. The bank was then owned by Saudi Arabians and certain Keating-related entities. The bank was restructured under new, French ownership as Société de Banque Privée, and is now known as Société d'Analyses et d'Etudes Bretonneau.

The subject of this lawsuit is a series of related transactions Saudi European Bank entered into in the 1980s with Lincoln Savings and Loan, now a failed thrift association. The bank participated

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[1] The Commission Bancaire of France, an instrumentality of the Bank of France charged with responsibility for the regulation of French Banks.

with Lincoln as an investor, making several million dollars in loans to third parties. The rights and duties of Lincoln and the bank were set forth in loan participation agreements. Lincoln was to collect the loan payments as they became due and forward to the bank its pro rata share. In return, Lincoln deposited several million dollars with the bank in the form of certificates of deposit. Lincoln, under conservatorship, stopped paying the bank its pro rata share of the payments Lincoln was collecting on the loans. In response, the bank refused to pay Lincoln on the certificates of deposit and attached them in a French legal proceeding.

RTC brought suit as receiver of Lincoln to recover on the certificates of deposit but sought to avoid paying the bank any sums due on the loan participation agreements, which RTC continued as receiver to collect. The action was brought in the United States District Court, District of Arizona, under section 501(1)(1) of the Financial Institutions Reform, Recovery and Enforcement Act of 1989, 12 U.S.C. § 1441a(1)(1).

The bank asserted its pro rata share of loan payments under the loan participation agreements as counterclaims and setoff

defenses. In addition, as part of the 1989 restructuring and transfer to new, French ownership, the Commission Bancaire cancelled obligations owed by the bank to its prior owners, including those created by the certificates of deposit issued to Lincoln that RTC sought to enforce. Thus, as to RTC's affirmative claim, the bank asserted as a defense that the claim was barred by the act of state doctrine.

The bank was initially represented by Shearman & Sterling. The parties entered into extended and ultimately fruitless settlement negotiations. Twenty months after the action was filed, Shearman & Sterling withdrew as counsel, requesting RTC to send all further papers to Robert Ted Parker.

Parker had been retained by the bank to represent it in related litigation, but it was undecided at the time as to whether Parker would represent the bank in the RTC litigation. RTC initially provided Parker with copies of pleadings and other papers. Later, however, RTC chose to serve two sets of papers directly on the bank, without copies to Parker. The first was a motion to extend the time for filing the pretrial order. In this motion, RTC disclosed

that it would be filing a summary judgment motion within the next 30 days. The second set of papers RTC served on the bank without copying Parker was the summary judgment motion itself.

RTC mailed the summary judgment motion to a Paris address from which the bank had moved some months earlier. As a consequence, the bank did not receive the papers, Parker had no knowledge of the motion, and no opposition was filed.

The District Court granted RTC's motion pursuant to Local Rule 11(i) of the District Court of Arizona, which provides that the failure to file and serve an opposition may be deemed consent to granting the motion summarily.

Bretonneau moved to vacate the order pursuant to Rule 60(b), Federal Rules of Civil Procedure. The district court granted Bretonneau's motion in part, stating:

> The court cannot overlook the possibility that plaintiff deliberately took advantage of defendant's delay in asking Parker to enter an appearance by providing Parker with copies of some pleadings but serving the Rule 42(C) and summary judgment motions directly on defendant without informing Parker that additional motions had been served.
>
> Appendix D at D-12.

The District Court ruled, nonetheless, that the action should be reinstated "with the limitation that [Bretonneau] may offer in defense of [RTC's] claims only the act of state defense identified in connection with this motion."

The limitation imposed by the District Court by its terms applied only to Bretonneau's permissible defenses, and the order thus appeared to reinstate Bretonneau's counterclaims. Bretonneau moved the court to amend and clarify its order vacating summary judgment. However, the District Court entered an order denying Bretonneau's motion to amend, thus reflecting that the motion to vacate had been denied as to Bretonneau's counterclaims.[2] Thus, the sole relief granted was to permit Bretonneau to present its act of state defense to RTC's claims.

As to Bretonneau's counterclaims, RTC's entire submission in support of its motion for summary judgment was the following unsupported statement from its memorandum of points and authorities:

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[2] The District court clerk's minute order stated that Bretonneau's motion to amend had been granted. Appendix E. This error was corrected in a subsequent order showing that the motion to amend was denied. Appendix F.

> Banque Privee has asserted a setoff against the $8 million deposited by Lincoln Savings. That asserted setoff is the basis for Banque Privee's counterclaim. Banque Privee, however, bears the burden of presenting evidence to support that claim, failing which the claim must be rejected [citing Celotex, 477 U.S. at 322-23 and Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986)]. Inasmuch as there is no evidence in the record to sustain Banque Privee's claim, judgment must be entered against defendant on the counterclaim unless defendant comes forward in its response with evidence to support each element.
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> Appendix G at G-3.

Under the well settled law of the Ninth Circuit, a district court abuses its discretion in granting a motion for summary judgment pursuant to Local Rule 11(i) "where the movant's papers are insufficient to support that motion." Henry v. Gill Indus., Inc., 983 F.2d 943, 950 (9th Cir. 1993).

On appeal, Bretonneau pointed out that RTC's moving papers failed to satisfy its initial burden as the moving party, citing this Court's decision in Celotex Corp. v. Catrett, 477 U.S. 317, 328 (1986) ("[i]t is not enough to move for summary judgment without supporting the motion in any way or with a conclusory assertion that the plaintiff has no evidence to prove his case;" White, J.,

concurring), and that RTC's moving papers were therefore insufficient to support the motion.

The Court of Appeals agreed that it would be an abuse of discretion to grant the motion pursuant to the local rule where the moving papers were insufficient to support the motion, but ruled that RTC's papers were, as a matter of law, sufficient:

> Under Henry v. Gill Indus., Inc., 983 F.2d 943, 950 (9th Cir. 1993), a district court abuses its discretion by granting a motion for summary judgment pursuant to Arizona Local Rule 11(i) "where the movant's papers are insufficient to support that motion or on their face reveal a genuine issue of fact." The district court did not abuse its discretion in this instance, however, because the RTC's papers were sufficient to support granting the motion, as the district court found.
>
> Appendix A at A-4.

Bretonneau also appealed on the ground that the District Court's application of the local rule violated constitutional due process. The Court of Appeals rejected this argument as well:

> Moreover, in light of Henry's determination that Arizona Local Rule 11(i), which allows the district court (in its discretion) to grant a motion for summary judgment where no opposition is timely filed and served, is consistent with the Federal Rules of Civil Procedure, it cannot now be said that the rule is unconstitutional.

Appendix A at A-4.

Bretonneau petitioned for rehearing and suggested en banc review. In its petition, Bretonneau pointed out to the Court of Appeals that RTC's entire submission in support of its motion was a single, conclusory assertion that Bretonneau, as the party bearing the burden of proof at trial, had no evidence to sustain its claims. Bretonneau noted that the panel did not dispute this in its opinion, nor was there any basis to do so. Finally, Bretonneau drew the panel's attention to the fact that its decision placed it in direct conflict with the law of the Fifth and Eleventh Circuits and with Justice White's concurring opinion in this Court's decision in Celotex.

The Court of Appeals declined to respond to these points, summarily denying the petition for rehearing and rejecting the suggestion for en banc review. Appendix B.

ARGUMENT

A. The Court Should Grant Review To Resolve The Conflict Among The Courts Of Appeal And To Avoid Uncertainty Among The Lower Courts As To Whether A Defendant Moving For Summary Judgment May Satisfy Its Initial Burden Under Rule 56 By Submitting Nothing More Than A Conclusory, Unsupported Statement That Plaintiff Has No Evidence To Prove Its Case.

This Court should grant review. Justice Brennan predicted that the Court's decision in Celotex would lead to uncertainty among the lower courts:

> [T]he Court has not clearly explained what is required of a moving party seeking summary judgment on the ground that the nonmoving party cannot prove its case. This lack of clarity is unfortunate: district courts must routinely decide summary judgment motions, and the Court's opinion will very likely create confusion.
>
> Celotex v. Catrett, 477 U.S. 317, 329 (Brennan, J., dissenting).

The judgments and opinions of the District Court and the Court of Appeals in the present lawsuit prove Justice Brennan's point. As set forth below, the Court of Appeals' judgment squarely conflicts with the law of the Fifth and Eleventh Circuits. Nor can there be any serious dispute that the rule of law must be, as Justice White stated

in Celotex, that a defendant cannot discharge its initial burden under Rule 56 by simply asserting that the plaintiff has no evidence to prove its case. The judgment of the Court of Appeals below is therefore plainly in error.

We request the Court to review as well the attendant question of whether the District Court's application of the local rule is consistent with constitutional due process. If a defendant may satisfy its initial burden under Rule 56 by merely asserting that the plaintiff has no evidence, the local rule operates as a rule of default, permitting a district court to enter summary judgment solely because an unsupported assertion by the moving party has gone unanswered. In analogous situations arising under Federal Rule of Civil Procedure 37, due process requires that a party be given notice and an opportunity for a hearing before a lawsuit may be terminated by dismissal.

B. The Judgment Of The Court Of Appeals Directly Conflicts With The Law Of The Fifth And The Eleventh Circuits, And With Authority From This Court In Celotex v. Catrett.

The initial burden under Rule 56 is on the movant. As the Ninth Circuit has stated:

> Under Federal Rule of Civil Procedure 56, a moving party is entitled to summary judgment only upon a showing that there are no genuine issues of material fact requiring a trial. The party opposing the motion is under no obligation to offer affidavits or any other materials in support of its opposition. Summary judgment may be resisted and must be denied on no other grounds than that the movant has failed to meet its burden of demonstrating the absence of triable issues.
>
> Henry, 983 F.2d at 949-50.

While the initial burden under Rule 56 is on the movant, this Court held in Celotex v. Catrett that a defendant might satisfy that burden by showing that plaintiff cannot produce evidence to prove its case. Justice White warned, however:

> It is not enough to move for summary judgment without supporting the motion in any way or with a conclusory assertion that the plaintiff has no evidence to prove his case.
>
> Celotex Corp. v. Catrett, 477 U.S. 317, 328 (1986) (White, J., concurring)

Justice White's point is surely correct. To merely assert that plaintiff has no evidence to prove its case is to satisfy no burden whatever. Rather, it amounts in substance to doing nothing more than saying that the plaintiff has the burden. As Justice Brennan pointed out:

> Plainly, a conclusory assertion that the nonmoving party has no evidence is insufficient. . . . Rather, as the Court confirms, a party who moves for summary judgment on the ground that the nonmoving party has no evidence must affirmatively show the absence of evidence in the record.
>
> Id. at 332 (Brennan, J., dissenting) (emphasis added).[3]

The Fifth and Eleventh circuits, following Celotex, have both held that a moving party defendant cannot satisfy its initial burden under Rule 56 with mere conclusory assertions that the other side has no evidence. In Ashe v. Corley, 992 F.2d 540 (5th Cir. 1993), the Fifth Circuit Court of Appeals reversed an award of summary judgment as to plaintiff's section 1983 claims, holding that the defendant failed to satisfy its initial burden under Celotex:

> From the Record, it is apparent that [defendant] totally failed to satisfy the movant's burden as set out in Celotex and Russ [v. International Paper Co., 943 F.2d 589 (5th Cir. 1991)]. [Defendant's] motion for summary judgment failed to point out an absence of proof on any factual issue. In fact, the motion failed to raise any factual issues at all, other than in the most

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[3] Had RTC attempted to "affirmatively show" the absence of evidence in the record, it would have had to concede there was such evidence. In its answer to the counterclaim RTC admitted that Lincoln was party to the loan participation agreements that formed the basis for the counterclaim. RTC's assertion was therefore not only conclusory, but false as well.

> conclusory terms. And a mere conclusory statement that the other side has no evidence is not enough to satisfy a movant's burden.[4]
>
> Id. at 544.

See also Fano v. O'Neill, 806 F.2d 1262, 1266 (5th Cir. 1987) (defendant failed to discharge its initial burden where it did "nothing more , . . than to say in its motion that [plaintiff] failed to state a claim and lacks evidence to prove the claim").

The law in the Eleventh Circuit is equally clear:

> In this circuit, "even after Celotex, it is never enough simply to state that the non-moving party cannot meet its burden at trial." Clark v. Coats & Clark, Inc., 929 F.2d 604 (11th Cir. 1991); see also Celotex, 477 U.S. at 328, 106 S. Ct. at 2555 (White, J., concurring) ("it is not enough to move for summary judgment without supporting the motion in any way or with a conclusory assertion that the plaintiff has no evidence to prove his case"); see also id. at 332, 106 S. Ct. at 2557 (Brennan, J., dissenting). Instead, the moving party must point to specific portions of the record in order to demonstrate that the nonmoving party cannot meet its burden of proof at trial.
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> United States v. Four Parcels of Real Property, 941 F.2d 1428, 1438 n.19 (11th Cir. 1991) (en banc) (vacating summary judgment and remanding to the

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[4] Nor was defendant's motion meritorious judged by the Rule 12(b)(6) standard. Id. at 545.

district court to apply the correct standard as to moving party defendant's initial burden)

Accord, Clark v. Coats & Clark, Inc., 929 F.2d 604 (11th Cir. 1991) (same).[5]

C. Arizona Local Rule 11(i) Cannot Be Applied, Consistent With Constitutional Due Process, To Enter Summary Judgment In Favor Of A Moving Party Defendant That Has Submitted Nothing More In Support Of Its Motion Than A Conclusory Assertion That Plaintiff Has No Evidence.

The District Court's application of the local rule operated as a judgment by default. RTC was awarded judgment not because it had demonstrated there were no triable issues of fact in the case, but solely because an unsupported allegation went unanswered. The idea that this procedure comports with due process flies in the face of reason. Even in cases of egregious misconduct, such as wilful refusals to respond to discovery requests, due process requires notice, an opportunity to be heard, and express, written consideration of less drastic alternatives by the court before the

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[5] Commentators are in agreement. Judge William Schwarzer, in a leading law journal, relied on Celotex in concluding that a motion for summary judgment based on a conclusory assertion that the nonmoving party has no proof not only would be "plainly insufficient," but "could violate Rule 11's injunction against harassment." Schwarzer, Summary Judgment and Case Management, 56 Antitrust Law J. 213, 215 (1987); (Initial Brief at 25.)

lawsuit may be dismissed. See, e.g., U.S. for Use and Benefit of Wiltec Guam, Inc. v. Kahaluu Construction Co., Inc., 857 F.2d 600, 602-04 (9th Cir. 1988). Clearly, there are more rational and less onerous ways of dealing with the failure to submit an opposition than the one followed in the District of Arizona; e.g., an order to show cause why the motion should not be granted.[6]

CONCLUSION

The entry of judgment against Bretonneau by the District Court and the affirmance by the Court of Appeals cannot be reconciled with any rational conception of due process. The judgment of the Court of Appeals rests on a ruling of law that squarely contradicts authority from this Court as well as the settled law of the Fifth and Eleventh Circuits, and that is clearly erroneous. The point of law is one that needs to be expressly addressed by this Court in order to provide direction to the district courts. We therefore respectfully request the Court to grant review.

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[6] Consider, e.g., the Ninth Circuit's approach to a similar problem: "If appellee does not elect to file a brief, appellee shall notify the court by letter on or before the due date for the answering brief. Failure to file the brief timely or to advise the court that no brief will be filed will result in the issuance of an order to show cause to counsel why sanctions should not be imposed." Circuit Rule 31-2.4.

Dated: June 17, 1994

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IN THE SUPREME COURT OF THE UNITED STATES

October 1994 Term

SOCIÉTÉ DE BANQUE PRIVÉE, f/k/a SAUDI EUROPEAN BANK, S.A., a French Company, now known as Société d'Analyses et d'Etudes Bretonneau,

Petitioner,

v.

RESOLUTION TRUST CORPORATION, as conservator for Lincoln Savings and Loan, F.A., a Federal savings and loan association,

Respondent.

Petition for Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

Appendices to Petition for Writ of Certiorari

APPENDIX A

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED
3/15/94

RESOLUTION TRUST CORPORATION, as conservator for Lincoln Savings and Loan, F.A., a federal savings and loan association,	No. 93-15335
Plaintiff-counter-defendant-Appellee,	D.C. No. CV-90-00615-RCB
v.	**MEMORANDUM***
SOCIETE DE BANQUE PRIVEE, f/k/a Saudi European Bank, S.A., a French company, now known as Societe D'Analyses et D'etudes Bretonneau,	
Defendant-counter-claimant-Appellant.	

Appeal from the United States District Court
for the District of Arizona
Robert C. Broomfield, District Judge, Presiding

Argued and Submitted February 11, 1994
San Francisco, California

Before: FERNANDEZ and ALARCON, Circuit Judges, and HILL, District Judge**

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

Societe de Banque Privee ("Banque Privee") appeals the district court's grant of summary judgment in favor of the Resolution Trust Corporation ("RTC"), as conservator for Lincoln Savings and Loan, F.A. The RTC is prosecuting this action on behalf of Lincoln, F.A., as its conservator. The RTC filed this action under 12 U.S.C. § 1441a(11) to recover $8 million that Lincoln Savings and Loan Association (Lincoln) had deposited with the Banque Privee in certificates of deposit. As counterclaims and offsets, Banque Privee sought its pro rata share of loan payments due from the RTC pursuant to loan participation agreements made between Banque Privee and Lincoln. We affirm.

A. The Notice of Appeal

The premature filing by Banque Privee of its notice of appeal is curable under Fed. R. App. P. 4(a)(2). The RTC moved for summary judgment on all remaining claims. By granting that motion in its entirety, the district court purported to dispose of all claims in the action, and thereby issued "a decision that would [have] be[en] appealable if immediately followed by the entry of judgment" -- a decision which Banque Privee also reasonably considered to be final.

** The Honorable Irving Hill, Senior United States District Judge for the Central District of California, sitting by designation.

FirsTier Mortgage Co. v. Investors Mortgage Ins. Co., 498 U.S. 269, 276, 111 S. Ct. 648, 653, 112 L. Ed. 2d 743 (1991) (emphasis omitted). This is sufficient under FirsTier to invoke the relation forward provision of Rule 4(a)(2) and rescue the premature notice of appeal.

The notice of appeal's reference to a singular ruling does not limit this court's review, either. Although Fed. R. App. P. 3(c) requires an appellant to "designate the judgment, order or part thereof appealed from" in its notice of appeal, the Supreme Court has determined that "a notice of appeal from a Rule 4(a)(2) 'decision' -- that is, a decision that would be appealable if immediately followed by the entry of judgment -- sufficiently manifests an intent to appeal from the final judgment for purposes of Rule 3(c)." FirsTier, id. at 276 n.6, 111 S. Ct. at 653 n.6. Since the final summary judgment ruling was just the last step in a process leading to the final judgment which, itself, disposed of all issues, Banque Privee's specification of the order alone in the notice of appeal manifested the bank's intent to appeal the entire judgment. We therefore review the propriety of the district court's various orders which led to that judgment.

B. The Initial Grant of Summary Judgment and Its Set Aside

Under Henry v. Gill Indus., Inc., 983 F.2d 943, 950 (9th Cir. 1993), a district court abuses its discretion by granting a motion for summary judgment pursuant to Arizona Local Rule 11(i) "where the movant's papers are insufficient to support that motion or on their face reveal a genuine issue of material fact." The district court did not abuse its discretion in this instance, however, because the RTC's papers were sufficient to support granting the motion, as the district court found. Moreover, in light of Henry's determination that Arizona Local Rule 11(i), which allows the district court (in its discretion) to grant a motion for summary judgment where no opposition is timely filed and served, is consistent with the Federal Rules of Civil Procedure, it cannot now be said that the rule is unconstitutional.

Banque Privee's claim that judgment against it was a discovery sanction is incorrect. The district court specifically granted summary judgment in the first instance pursuant to Local Rule 11 and due to the fact that the motion appeared well-taken, and in the second instance "[b]ecause the relevant facts . . . [were] not disputed." To the extent the district court noted the bank's failure

to provide discovery, it was solely in connection with the RTC's assertions, and not the basis for the court's ruling. The district court's dismissal of the bank's counterclaim was therefore not a discovery sanction, as the bank contends.

Banque Privee complains because the district court did agree to set aside the first summary judgment, but only in part. Given the manner in which Banque Privee conducted this litigation before current counsel became of record, we are of the opinion that the district court, after it made its extensive analysis of the situation, could properly have denied any reopening of the first summary judgment. Thus, we fail to see how Banque Privee was prejudiced by the court's decision to open it only in part.

C. Evidentiary Rulings in Connection with Second Summary Judgment

The bank's contentions that the court impermissibly, without notice, struck the report of its expert on the act of state doctrine and refused to consider its arguments under French law because of its failure to respond to discovery are incorrect. The district court's striking of that portion of Mr. Parker's declaration which authenticated the expert's report was in response to objections filed

by the RTC with its reply and served on the bank. The bank cannot be heard to say now that it had no "notice." Moreover, even if the district court erred by striking a portion of the authenticating declaration, that error would not mandate reversal. The bank would have suffered no prejudice thereby, because the court found that the report's abstract discussion of French law was not even relied upon in the bank's papers, and that the report had no real persuasive value.

D. The Act of State Doctrine Does Not Apply

Under the act of state doctrine, "courts will not examine the validity of acts of foreign states -- even if in conflict with our notions of justice -- if those acts are executed within the foreign state's territory." Tchacosh Co. v. Rockwell Int'l Corp., 766 F.2d 1333, 1335-6 (9th Cir. 1985). In other words, the doctrine "prohibits [a] U.S. court [] from reaching the merits of an issue -- even though [it] otherwise ha[s] jurisdiction -- in order to avoid embarrassment of foreign governments in politically sensitive matters and interference with the conduct of our own foreign policy." West v. Multibanco Comermex, S.A., 807 F.2d 820, 827 (9th Cir.), cert. denied, 482 U.S. 906, 107 S. Ct. 2483, 96 L. Ed. 2d 375 (1987).

The doctrine does not apply unless (1) a court is required "to judge the validity of the public acts of a sovereign state," (2) "performed within its own territory," Callejo v. Bancomer, S.A., 764 F.2d 1101, 1113 (5th Cir. 1985); (3) in order "to give effect to [the foreign state's] public interests." Timberlane Lumber Co. v. Bank of America, N.T. & S.A., 549 F.2d 597, 607 (9th Cir. 1976). "The crucial element in determining whether deference should be accorded in any given case" under the act of state doctrine is "the potential for interference with our foreign relations." Id. Since Banque Privee invokes the doctrine as an affirmative defense, it bears the burden of proving the doctrine's applicability. See Alfred Dunhill of London, Inc. v. Cuba, 425 U.S. 682, 694, 96 S. Ct. 1854, 1861, 48 L. Ed. 2d 301 (1975).

"Act of state issues only arise when a court must decide - that is, when the outcome of a case turns upon - the effect of official action by a foreign sovereign. When that question is not in the case, neither is the act of state doctrine. That is the situation here." W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp. Int'l, 493 U.S. 400, 409-10, 110 S. Ct. 701, 705, 107 L. Ed. 2d 816 (1990) (emphasis in original). The act of state doctrine "does not bestow

a blank-check immunity upon all conduct blessed with some imprimatur of a foreign government." Timberlane, 549 F.2d at 606. Although "[a]cts of business [may] become effectively acts of the sovereign" and the corporations "have no choice but to obey" the sovereign's order, that is not the case here. Id. (internal quotations omitted).

The record does not establish that the French banking authority compelled Banque Privee to repudiate its obligations to the RTC. At most the evidence shows that the Bank of France pushed Banque Privee to consummate a sale Banque Privee had itself initiated upon concluding that it could not sufficiently recapitalize the bank to comport with French law and the Bank of France's request. The evidence does not indicate that the French banking authority forced Banque Privee to sell in the first place to Bouyges or anyone under terms which would eradicate payment to the RTC. Rather, it was the negotiations between two private parties, Bouyges and Banque Privee, which created the purchase agreement and its terms. Since the Bank of France neither ordered the sale to Bouyges nor compelled the terms pursuant to which it was consummated, no "act of state" exists to preclude payment to the RTC. We therefore

affirm the district court's grant of summary judgment as to the bank's act of state defense.

AFFIRMED.

APPENDIX B

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED
5/3/94

RESOLUTION TRUST CORPORATION, as conservator for Lincoln Savings and Loan, F.A., a federal savings and loan association, Plaintiffs-counter-defendant-Appellee, v. SOCIETE DE BANQUE PRIVEE, f/k/a Saudi European Bank, S.A., a French company, now known as Societe D'Analyses et D'etudes Bretonneau, Defendant-counter-claimant-Appellant.	No. 93-15335 D.C. No. CV-90-00615-RCB **ORDER***

Before: ALARCON and FERNANDEZ, Circuit Judges, and HILL, District Judge.*

The panel has unanimously voted to deny the appellant's petition for rehearing. The suggestion for rehearing en banc was

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* Honorable Irving Hill, Senior United States District Judge for the Central District of California, sitting by designation.

circulated to the active judges of the court, and no judge requested a vote for en banc consideration.

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

APPENDIX C

FILED
6/12/92

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

RESOLUTION TRUST CORPORATION, Receiver for Lincoln Savings and Loan, F.A., a Federal savings and loan association,	No. 90-0615 PHX RCB
Plaintiffs,	ORDER
v.	
SOCIETE DE BANQUE PRIVEE, formerly known as Saudi European Bank, s.a., a French corporation,	
Defendants.	

Plaintiff filed a motion for summary judgment on March 27, 1992. To date, defendant has not responded. Rule 11(i) of the Local Rules of Practice for the District of Arizona provides that the court may deem a party not responding to a motion to have consented to the granting of the motion. In the absence of any

response, the court finds also plaintiff's motion well-taken. The court will therefore grant the motion pursuant to Local Rule 11(i).

Plaintiff seeks judgment on its claim for $8,132,569 for sums deposited with defendant plus interest accrued, plus prejudgment interest. Plaintiff also seeks dismissal of defendant's counterclaim on the grounds that there is no evidence on the record supporting that claim and that defendant has failed to provide any requested discovery concerning the claim. The court will grant the motion with regard to both the claim and counterclaims.

Plaintiff also seeks recovery of its attorney's fees and costs. Plaintiff provides no grounds upon which attorney's fees would be recoverable in this action, however, and the court will therefore deny the motion for attorney's fees without prejudice.

IT IS ORDERED granting plaintiff's motion for summary judgment (Doc. No. 80) except to the extent such motion seeks recovery of plaintiff's attorney's fees.

IT IS FURTHER ORDERED directing plaintiff to file and serve on defendant a proposed form of judgment consistent with this order.

DATED this 12 day of June, 1992.

/s/_____
Robert C. Broomfield
United States District Court

Copies to all parties of record

APPENDIX D

FILED
9/21/94

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

RESOLUTION TRUST CORPORATION, Receiver for Lincoln Savings and Loan, F.A., a Federal savings and loan association,	No. CV-90-0615 PHX RCB
Plaintiffs,	ORDER
v.	
SOCIETE DE BANQUE PRIVEE, formerly known as Saudi European Bank, s.a., a French corporation,	
Defendants.	

The court granted plaintiff's motion for summary judgment on June 12, 1992 pursuant to Local Rule 11(i) after defendant[1] failed to respond. Defendant moves to vacate the order on the ground that defendant never received a copy of the motion or any

[1] Defendant was renamed "Societe D'Analyses et d'Etudes Bretonneau" after a restructuring in 1991. Counsel now refer to defendant as "Bretonneau" although no motion has been made to substitute parties or amend the caption.

notice that it had been filed until the court sent a copy of the order granting the motion to defendant's counsel in San Francisco. The motion has been fully briefed and the court heard oral argument.

I. FACTS

Defendant's New York counsel, Shearman & Sterling, withdrew in December 1991 without substitution of counsel, pursuant to order of the court dated November 15, 1991. Shearman & Sterling wrote to the RTC and its counsel at the time requesting that all documents and correspondence for defendant be mailed to defendant's current counsel in San Francisco, Robert Ted Parker. A copy of the letter was directed to a member of this court's staff. Parker never filed an appearance, however, until June 29, 1992.

In the meantime, plaintiff's counsel Robert Houser exchanged correspondence and several telephone calls with Parker. Houser states by affidavit that he spoke with Parker on November 19 and December 4, 1991 and on January 17, 1992. Houser states that he informed Parker of impending discovery and Local Rule 42(C) deadlines and that Parker repeatedly stated he had not yet been asked to file an appearance for defendants in this action.

On January 31, 1992, Houser sent Parker copies of the pleadings filed in this case up to that time and asked whether Parker would be appearing for defendant. Parker responded on February 18 stating that he anticipated appearing but at the time had been retained only for purposes of representing defendant in the American Continental Corporation ("ACC") litigation in Tucson. He also requested a copy of the temporary restraining order entered in 1990 in this action freezing the bank's U.S. assets. Houser complied by letter dated February 26, 1992.

Meanwhile, on February 20, plaintiff filed a motion to modify the order requiring compliance with Rule 42(C). The motion states plaintiff's intention of filing a motion for summary judgment within 30 days. The motion also indicates a copy was mailed to defendant's Champs-Elysees address in Paris. Parker admits in his declaration that defendant received the motion and forwarded it to him. On March 27, 1992, plaintiff filed a motion for summary judgment and again mailed a copy to the Champs-Elysees address. Parker contends his client never received that motion and that he only learned of it when the court sent him a copy of the order

granting it. He states he then sought to obtain Houser's stipulation to vacate the judgment but Houser refused.

The motion asserts several grounds for vacating the judgment pursuant to Rule 60(b). First, defendant argues that the failure to respond resulted from "excusable neglect." Defendant proposes several grounds for this finding, including non-receipt of the motion. Defendant in effect suggests that its failure to respond was a result of plaintiff's own "neglect" for failing to send a copy of the motion to Parker. Second, defendant contends it has a meritorious defense that it should be allowed to assert.

II. ANALYSIS

Defendant's allegation that it never received a copy of the motion is supported by the declaration of defendant's corporate secretary Jean-Jacques Malegeant which was executed and filed sometime in July 1992. Malegeant states that defendant's offices are located at the Champs-Elysees address to which the motion for summary judgment was mailed. He also asserts he has been responsible for receiving and distributing all mail delivered to defendant at that address throughout 1992 and he never received the motion. He offers no explanation why he would not have received

the motion. Parker admits in his declaration that defendant received the motion concerning Rule 42(C) compliance at the Champs-Elysees address and forwarded it on to Parker.

In response, plaintiff argues that defendant cannot claim excusable neglect for non-receipt because service of the motion was to defendant's last-known address and defendant conceded in the motion that the address was correct. Plaintiff argues that such service is "complete upon mailing" under Fed. R. Civ. P. 5(b) and cites authority holding that when service is effective under Rule 5(b) alleged non-receipt is irrelevant.

Defendant's reply takes issue first with the notion that the Champs-Elysees address in Paris was its "last-known address" for purposes of Rule 5. First, defendant argues that Shearman & Sterling's letter to plaintiff and its counsel requesting that documents be directed to Parker changed defendant's last-known address to that of Parker. In addition, defendant contends the letter constituted notice that defendant was "represented by an attorney" and Rule 5 therefore required that service be made on Parker whether or not he had filed a notice of appearance.

Second, defendant argues that as of November 22, 1991, its "head office" was relocated to Rue Carpeaux in Paris and the Champs-Elysees address was therefore no longer its correct address. Defendant supports that position with a letter from defendant's Swiss counsel to a New York bank regulator indicating the change of address. Defendant further asserts that the motion concerning Rule 42(C) reached defendant at "the new Rue Carpeaux" address "apparently by pure happenstance, evidently forwarded by an unknown person at the old Champs-Elysees address in Paris."

Plaintiff argued orally that Rule 5 requires mailing only to the "last-known address" whether or not that address is correct and that defendant has never asserted that it notified the court or parties to this litigation of any change of address. Thus, even if defendant did move, it would not have changed its "last-known address" for purposes of effecting service under Rule 5. In addition, plaintiff notes that the rules do not provide for service on any attorney representing a corporation in a matter other than the present litigation. Plaintiff argues that such a rule would result in chaos because a corporation may have many attorneys representing it in various actions at any one time. Finally, plaintiff argues that even

if Shearman & Sterling's letter may be interpreted as establishing that defendant was represented by an attorney in this action for purposes of Rule 5, the letter was effectively negated by Parker's continued representation that he had not been retained to represent defendant in this action.

The court inquired of defendant's counsel at oral argument concerning the apparent discrepancy between defendant's present assertion that it had a never office as of November 22, 1991 and the affidavit of its corporate secretary stating he received mail on behalf of the corporation at the Champs-Elysees address through 1992. Defendant's counsel responded that the corporation essentially was divided at the time it was restructured and that the entity inheriting the assets and obligations at issue in this case removed its headquarters to Rue Carpeaux in November 1991.

Defendant also cites authority for vacating judgment on other grounds it contends are applicable here: (1) a misunderstanding concerning representation and appearance by counsel; defendant cites plaintiff's failure to honor defendant's "fail safe" request that documents be served on Parker; (2) failure to serve by registered or certified mail or to last address furnished and no actual notice;

(3) counsel preoccupied by other litigation, here the ACC litigation; and (4) misrepresentations or misunderstandings between counsel. Defendant also emphasizes the large amount of the judgment involved, $8 million.

Plaintiff objects to the suggestion that it had some obligation to serve Parker with a "courtesy copy" of the motion. Plaintiff argues that this notion would ignore the service provisions of Rule 5 and the fact that plaintiff was told "repeatedly" by Parker that he had not been retained to represent defendant in this action. Plaintiff maintains that service on the party is proper where the party is no longer represented by counsel and argues that plaintiff had no obligation to continue "to waste any more time dealing with defendant's non-appearing counsel." Finally, plaintiff argues defendant had a duty to monitor the status of this action, especially in light of the indication in the Rule 42(C) motion that a summary judgment motion was imminent. Plaintiff accuses defendant of purposely not entering an appearance in order to further delay this litigation.

Defendant also argues that it has a meritorious defense to the allegations in the complaint and thus presumably to the grounds

asserted for summary judgment. Defendant states it has an offsetting counterclaim that is greater than the amount claimed in the complaint and that it has an "act of state" defense to plaintiff's claims. This defense would rely on the doctrine that the judiciary must avoid interfering in the conduct of foreign affairs the authority for which is accorded by the constitution to the political branches of government. See Timberlane Lumber Co. v. Bank of America, 549 F.2d 597, 605 (9th Cir. 1976). Defendant asserts that acts of the French government to prevent the collapse of the bank, which in effect created a "bridge bank," relieves the restructured bank of any liabilities created by the former bank's shareholders. Defendant asserts that it obtained a directed verdict in the ACC litigation based on just such a defense.

Plaintiff responds that defendant cannot raise the act of state defense now because it failed to do so at the pleading stage. In addition, plaintiff cites defendant's failure to provide any discovery on this defense or on any of its counterclaims against plaintiff and argues that no evidence has yet been offered to support the alleged defense.

Defendant argues in reply that the act of state defense cannot be waived by failure to assert it in a timely fashion and that the court may consider it sua sponte. Defendant relies on a Ninth Circuit decision, Pacemaker Diagnostic Clinic of America v. Instromedix, Inc., in which the court held that private parties cannot waive a defense which is based on the principle of separation of powers. Pacemaker, 725 F.2d 537 (9th Cir. 1984), cert. denied, 469 U.S. 824 (1984).

The court will grant defendant's motion to vacate the judgment but will prohibit defendant from offering any defense other than the act of state defense presented in summary form in connection with this motion. The court finds the existence of excusable neglect to be a close question. On the one hand, plaintiff's arguments concerning the sufficiency of service appear to be technically correct and the court considers defendant's contention that it never received the motion in Paris somewhat suspect. On the other hand, Shearman & Sterling requested in December 1991 that all documents and correspondence intended for defendant be sent to Parker. In addition, even though Parker did not enter an appearance as required to file pleadings under Local Rule 8, Parker made it

clear to plaintiff that he represented defendant's interests generally and expected eventually to represent them in this action. Contrary to plaintiff's suggestion at oral argument, Parker does not appear actually to have disclaimed any representation of defendant in this action either in correspondence or in the telephone conversations described by Houser. Rather, Parker appears to have stated consistently that he represented the defendant and expected to represent them in this litigation but that he had not yet been instructed to enter an appearance.

Neither party cites any authority concerning whether in such circumstances a party should be considered "represented by an attorney" for purposes of Rule 5. The correspondence and telephone calls between Houser and Parker during the months preceding the filing of the motion, however, provided defendant with at least some grounds for believing plaintiff would tell Parker if a significant motion were being served on his client. Parker might even have been justified in expecting a "courtesy copy" as he claims because Houser had provided Parker copies with the other pleadings filed to that point. The only apparent exception is the motion pertaining to the Rule 42(C) deadline which indicated plaintiff intended to file a

summary judgment motion. As it turns out, defendant's employees in Paris did send a copy of the Rule 42(C) motion to Parker. Plaintiff apparently did not know, however, that Parker had received a copy of the motion. The court cannot overlook the possibility that plaintiff deliberately took advantage of defendant's delay in asking Parker to enter an appearance by providing Parker with copies of some pleadings but serving the Rule 42(C) and summary judgment motions directly on defendant without informing Parker that additional motions had been served.

Furthermore, Parker was retained only in November 1991 to represent defendant in the ACC litigation in Tucson and his client was dismissed in that case on June 12, 1992, the same day this court entered summary judgment against defendant in this case. Parker attests that he called the court immediately upon receiving a copy of the order, that he then attempted to obtain plaintiff's stipulation to vacate judgment and that he filed this motion as soon as it was clear plaintiff would not agree. Parker's response to receipt of the order indicates that it did take him by surprise. Even if defendant received the motion in Paris, it appears the motion was either not forwarded

to Parker or was overlooked by Parker or his staff in the press of other business.

Finally, plaintiff itself did not actively pursue this case for some period of time because of settlement negotiations "which dragged on inconclusively for many months." Response at 3. Plaintiff admits that the parties agreed to extend the time for defendant to respond to the discovery requests to November 1991 for that reason. Shearman & Sterling withdrew in early December shortly after the discovery responses would have been due. Thus, defendant's "default" on its discovery obligations is not as egregious as plaintiff would have it appear. The court therefore will not prohibit defendant from offering the act of state defense for failure to provide discovery.

The court emphasizes that it takes no position on whether the act of state defense has any merit. Plaintiff raised serious substantive objections to the applicability of that defense in this case given defendant's position in the ACC litigation that the intent of the act in question was to protect depositor's claims like those at issue here from the claims of non-depositor creditors. Defendant argued in response that the restructured institution was not liable for any

obligation that arose in connection with a shareholder to the prior entity, even if the claim is based on a deposit. It is, of course, inappropriate for the court to address the merits of the defense in this motion. However, it is sufficient for purposes of this motion to find that defendant has supplied at least some basis for its assertion that it has a meritorious defense.

IT IS SO ORDERED granting defendant's motion to vacate judgment (Doc. No. 89).

IT IS FURTHER ORDERED reinstating this action with the limitation that defendant may offer in defense of plaintiff's claims only the act of state defense identified in connection with this motion.

DATED this 18 day of September, 1992.

/s/_____
Robert C. Broomfield
United States District Court

Copies to all parties of record

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA
November 23, 1992

Civil Minutes - General

Case No. 2:90-cv-00615

Title: Resolution Trust Cor v. Societe de Banque

DOCKET ENTRY
Robert Houser for Pltf
Robert Parker, by telephone, for Deft

CLERK'S MINUTES Crt Rptr: R. Huckaby-Cotton: ECR:

granting motion to amend order by dft [108-1] allowing dft until 12/7/92 to file such additional further response if necessary to interrogatories,

pltf may have until 12/21/92 to take depositions;

Dft to respond to Pltfs Motion for Summary Judgment (Doc 80) by 12/11/92 with pltf reply by 12/21/92; court sets a hearing for MONDAY, JANUARY 11, 1993 at 11:00 a.m.

cc cnsl of rcd

CASE ASSIGNED TO:

Hon. Robert C. Broomfield, Judge

APPENDIX F

Date: 11/25/92

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

RTC	)	No. CIV-90-615 PHX
	)	RCB
Plaintiff,	)	
	)	
v.	)	**AMENDED**
	)	**DOCKET**
SOCIETE DE BANQUE	)	
	)	
Defendant.	)	
	)	

IN THE ABOVE MATTER hearing of 11-23-92 re: Motion to Amend Order by Deft (Doc 108) is corrected to reflect that the Court denied the motion.

Richard H. Weare, Clerk

/s/_____
Deputy Clerk

cc: Houser
Parker

APPENDIX G

Robert C. Houser
Douglas Gerlach
BROWN & BAIN, P.A.
2901 North Central Avenue
Post Office Box 400
Phoenix, Arizona 85001-0400
(602) 351-8000

Attorney State Bar No. 005722
Attorney State Bar No. 006869

Attorneys for Plaintiff

FILED
3/27/92

UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

RESOLUTION TRUST CORPORATION, Receiver for Lincoln Savings and Loan, F.A., a Federal savings and loan association, Plaintiff, v. SOCIETE DE BANQUE PRIVEE, formerly known as Saudi European Bank, s.a., a French corporation, Defendant.	No. CV-90-0615 PHX RCB **PLAINTIFF'S MEMORANDUM IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT**

The RTC's Claim

Lincoln Savings and Loan Association deposited $3 million with Societe de Banque Privee in June, 1985 [State. of Facts, para. 3], and $5 million in the form of a certificate of deposit in March, 1989 [id., para. 5]. Banque Privee concedes that those sums were deposited with it. [Answer, paras. 7, 8, 12; Response to Plfts.' Application for Prelim. Injunction (filed 4/27/90) at 2 (para. 3), 3 (para. 5), and Ex. 1 (para. 3)] In May and June 1989, demand was made for the return of those deposits; however, Banque Privee refused to honor the demand and has continued to hold the funds. [State. of Facts, paras. 4, 6]

In these circumstances, the RTC, which stands in the shoes of the original depositor [State. of Facts, para. 1], is entitled to recover the deposited sums together with accrued interest. See e.g., Texas Commerce Bank-Hurst, N.A., 703 F. Supp. 592, 594 (N.D. Tex. 1988) ("a debtor/creditor relationship exists between the depositor of funds and the bank into which the funds are deposited ... [and] the depositor has a right to direct the bank on how the funds should be disbursed"), aff'd, 896 F.2d 152 (5th Cir. 1990); see also Bank of Marin v. England, 385 U.S. 99, 101 (1966) ("The

relationship of bank and depositor is that of debtor and creditor"); Travelers Indem. Co. v. State, 140 Ariz. 194, 196, 680 P.2d 1255, 1257 (App. 1984) (same).[1] Accordingly, judgment in the amount of $8,132,569[2] along with pre-judgment interest should be entered in favor of RTC on its complaint.

The Counterclaim

Banque Privee has asserted a setoff against the $8 million deposited by Lincoln Savings. That asserted setoff is the basis for Banque Privee's counterclaim. Banque Privee, however, bears the burden of presenting evidence to support that claim, failing which the claim must be rejected. Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986) (summary judgment is mandated when "the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the

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[1] That some of the funds were deposited eventually in the Paris, France branch of the bank does not alter the result here. E.G., Vishipco Line v. Chase Manhattan Bank, N.A., 660 F.2d 854, 864 (2d Cir. 1981) ("A bank which accepts deposits at a foreign branch becomes a debtor ... with respect to its depositors"), cert. denied, 459 U.S. 976 (1982).

[2] This figure represents the principal amount of the deposits as well as $132,569.00 in interest that had accrued on the $5 million CD.

burden of proof"); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986) ("there is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party"). Inasmuch as there is no evidence in the record to sustain Banque Privee's claim, judgment must be entered against defendant on the counterclaim unless defendant comes forward in its response with evidence to support each element.

Moreover, the RTC served written discovery on Banque Privee in July, 1990, seeking to uncover the basis for that counterclaim, and in January, 1992, served a notice of deposition on Banque Privee pursuant to Fed. R. Civ. P. 30(b)(6). [State. of Facts, paras. 7 and 8] Banque Privee has failed to provide any of that discovery, and the Court-ordered discovery deadline has passed. In these circumstances, even if summary judgment were not warranted, dismissal of the counterclaim would be. Fed. R. Civ. P. 37(d); Sigliano v. Mendoza, 642 F.2d 309, 310 (9th Cir. 1981) ("Dismissal is a proper sanction under Rule 37(d) for a ... total failure to respond to discovery even without a prior order").[3]

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[3] Banque Privee received several extensions to answer the written discovery, but the last such extension expired in early-

Conclusion

RTC's motion for summary judgment should be granted and judgment should be entered in favor of RTC on its complaint in the amount of $8,132,569 together with pre-judgment interest and plaintiffs' costs, including reasonable attorneys' fees, and against defendant on its counterclaim.

March 27, 1992

Respectfully submitted,

BROWN & BAIN, P.A.

By _____

Robert C. Houser
Douglas Gerlach
2901 North Central Avenue
Post Office Box 400
Phoenix, Arizona 85001-0400

Attorneys for Plaintiff

December, 1991. The RTC attempted to serve Banque Privee with the deposition notice by Federal Express and by mail. Banque Privee refused to accept the Federal Express delivery; the mailing has not been returned.

Copy mailed March 27, 1992,
to:

Societe de Banque Privee
90 Avenue Des Champs-Elysses
75008 Paris, France

/s/ S. White

APPENDIX H

FILED
1/14/93

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

RESOLUTION TRUST CORPORATION, receiver for Lincoln Savings and Loan, F.A., a Federal savings and loan association,	No. CV-90-0615 PHX RCB
Plaintiff,	**ORDER**
v.	
SOCIETE DE BANQUE PRIVEE, formerly known as Saudi European Bank, s.a., a French corporation,	
Defendant.	

Back in march of 1992, the RTC filed a motion for summary judgment in this case. After an extended series of intervening events, defendant Societe de Banque Privee responded to the RTC's motion and the RTC then replied to the defendant's response. The court heard oral argument on the motion on January 11, 1993, and now rules.

BACKGROUND

The RTC, in its capacity as conservator of Lincoln Savings and Loan Association, filed suit against the defendant on April 20, 1990. The RTC's complaint alleges that Lincoln deposited large amounts of money with Saudi European Bank, the defendant's predecessor, and that the defendant to date has wrongfully refused to return to the RTC the deposited funds and the accrued interest on the funds.[1]

Societe de Banque's answer to the RTC's complaint alleged that Societe de Banque is entitled to an offset on any funds it owes to Lincoln because Lincoln owes Societe de Banque a large amount of money arising from loan participation agreements between Lincoln and Societe de Banque. The defendant also asserted a number of counterclaims against the RTC based on these allegedly unsatisfied loan participation obligations.

The RTC moved for summary judgment on its claims on March 27, 1992. After defendant failed to respond to the RTC's

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[1] The funds were deposited in two different transactions. The first involved a deposit of $3,000,000, the second involved the purchase of a certificate of deposit in the amount of $5,000,000.

motion for summary judgment, the court granted plaintiff's motion for summary judgment pursuant to Rule 11(i), Rules of Practice of the United States District Court for the District of Arizona.

Within days, the defendant moved the court to vacate its order that granted plaintiff summary judgment. The RTC opposed defendant's motion. The court, in an order dated September 21, 1992, vacated the judgment against the defendant but did so subject to certain conditions. Most important, the court stated that the only defense defendant could offer in response to plaintiff's summary judgment motion was the act of state defense, which defendant relied upon when seeking to set aside the court's judgment. Order of Sept. 21, 1992 at 8-9. On November 23, 1992, in response to a motion by the defendant to amend the September 21 order, the court made clear that the September 21 order precluded defendant from pursuing its counterclaims in this litigation. In addition, the court instructed the parties as to how they should carry out further briefing of the plaintiff's summary judgment motion.

Societe de Banque submitted its response on December 11, 1992. The response contains two arguments. The first argument is that the plaintiff, the moving party, has not shown the absence of a

fact issue or entitlement to judgment because French law applies to the contested deposits and because, under French law, the plaintiff would not be entitled to recover the deposits. More specifically, defendant's argument is that the plaintiff cannot establish entitlement to judgment because French law would recognize defendant's right to set-offs for the debts allegedly owed to the defendant by Lincoln arising from the transactions set forth in defendant's answer and counterclaims in this case. In other words, defendant takes the position that French law would not permit the plaintiff to withdraw the deposits from a French bank to the extent that the plaintiff owes unpaid sums to the defendant. As support, defendant points to two orders by French courts that appear to attach some of the funds deposited by Lincoln in Saudi European Bank.

The second argument put forth by the defendant is that the act of state doctrine bars plaintiff's suit against the defendant for recovery of the deposits. Defendant's position with respect to this argument appears to be that, when the French government participated in the sale of the Saudi European Bank in 1989 and the restructuring of the defendant in 1991, the French government

somehow granted immunity to the defendant for the claims brought by the RTC.

Accompanying the RTC's reply are a number of objections to the evidence submitted by the defendant in support of its opposition to plaintiff's summary judgment motion. The RTC asks that the court preclude the defendant from introducing any evidence in support of its act of state defense on the ground that the defendant "took almost a year to respond to plaintiff's interrogatories, but has refused, despite requests, to provide a verification for its responses." The RTC asserts that it sought verification to identify a knowledgeable individual to depose in connection with the answers. The RTC also moves to strike nearly all of the other evidence submitted by the defendants on various grounds including hearsay, lack of personal knowledge, lack of foundation, and other grounds.

In its reply, the RTC asserts that defendant's arguments about French law should be ignored on the ground that the court has stated expressly that the only defense defendant may offer in this case is the act of state defense. The RTC emphasizes that defendant's arguments about French law are particularly inappropriate because the arguments focus on how French law would treat the relationship

between defendant's alleged offsets and the RTC's claims. The RTC notes that the court twice has prohibited the defendant from pursuing these offsets in this litigation.

With respect to the defendant's act of state defense, the RTC argues that the defense cannot be applied in this case for a number of reasons. First, the RTC contends that the defendant has admitted a number of times that the French government did not intend to cut off depositor claims. Second, the RTC contends that the defense is barred by 22 U.S.C. § 2370(e)(2), which provides that the act of state defense does not apply to cases in which a claim of a right to property is asserted based on "a confiscation or other taking" by an act of another state. Third, the RTC argues bluntly that the defendant simply has failed to show any particular act of state in this case. Fourth, the act of state doctrine does not apply in situations in which the act of a foreign state operates on property outside the foreign sovereign's borders. The RTC argues that the deposits in this case were made into the defendant's New York agency and that, therefore, the only property potentially expropriated in this case was located in the United States. Finally, the RTC maintains that the act of state defense is only applicable in the absence of a treaty or other

unambiguous agreement regarding controlling legal principles. According to the RTC, the defense, therefore, cannot be applied in this case because a treaty between the United States and France sets forth controlling legal standards to be used when the government of France causes a taking of property belonging to an American company.

DISCUSSION

I. THE ALLEGED CONFLICT WITH FRENCH LAW

For essentially the reasons set forth in the RTC's reply brief, the court has serious doubts as to whether French law is applicable to this case or, just as importantly, whether any conflict exists between French and either New York or Arizona law. Arguments that a French court would entitle defendant to offset its alleged claims against plaintiff's deposits neither distinguish French law from American law nor adequately take into account that, for reasons connected to the defendant's conduct in this case, the court has limited the defendant to putting forth the act of state defense.

Defendant's arguments about French law, therefore, are not appropriate and will not be considered by the court.[2]

II. THE ACT OF STATE DEFENSE

Under the judicially created act of state doctrine, American courts generally will refrain from examining the validity of a taking by a foreign state within its own territory. See generally Restatement of the Law (Third), The Foreign Relations Law of the United States § 443 (1987). The contours of the doctrine are rather unclear, having been shrouded by numerous exceptions, both statutory and judicial. Nevertheless, although numerous questions relating to the doctrine remain unresolved, the facts of this case present no novel issue, and the matter can be resolved even without extensive analysis of the doctrine.

The burden of establishing the particular act of state by a foreign government is on the party invoking the doctrine. See Republic of Philippines v. Marcos, 818 F.2d 1473, 1482 n.6 (9th

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[2] To the extent that defendant attempts to paint its French law argument not as a defense but rather as evidence that the RTC cannot prove that it is entitled to judgment, the court is not persuaded. For the third time, this time at the back door, the court rejects defendant's attempts to interject arguments regarding set-offs into this litigation.

Cir. 1987); Restatement, supra, § 443 comment i. To invoke the doctrine, defendant must present proof of a constitutional amendment, statute, resolution, or decree by the French government repudiating the defendant's obligation to repay the subject deposits. See Alfred Dunhill of London, Inc. v. Republic of China, 425 U.S. 682, 695 (1976).[3] Defendant has not presented sufficient proof of relevant government conduct in this case for the act of state defense to be applicable.

The French government conduct relied upon by the defendant is a grant of immunity allegedly given by French banking officials to the defendant or its predecessor during the government's participation in the forced sale of Saudi European Bank in 1989 and again during the restructuring of the defendant in 1991. Although counsel for the defendant has argued to the contrary, the record contains no significant evidence that French banking officials

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[3] The court recognizes that governmental acts by foreign officials that are not formally embodied in a decree or writing nevertheless may be sufficient to implicate the act of state doctrine. At a very minimum, however, the party seeking protection under the doctrine must present some evidence that a foreign official, acting in a governmental capacity, deliberately caused the event of which the plaintiff complains.

immunized the defendant from the specific claims brought by the RTC in this case.

In its papers and at oral argument, defendant discussed at length the government's role in aiding in the sale of Saudi European Bank in 1989. The defendant, however, never ties this history to any sort of immunity given to the defendant from depositor claims. Defendant's persistent assertion that the claims brought by the RTC in this case are not ordinary depositor's claims, whether correct or not, proves very little by itself.

If the French government indeed did grant the defendant immunity from depositor claims in general or from the RTC's claims in particular, then the defendant would have put forth a relevant act of state.[4] The defendant, however, has not raised a legitimate factual issue as to whether such a grant of immunity ever was given. As the RTC points out, the only possible reference to immunity granted to the defendant in all the evidence submitted by the parties

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[4] This is not to say that none of the many potential exceptions to the act of state doctrine apply in this case. Although the court does not rule on the applicability in this case of any exceptions to the act of state doctrine, the court finds many of the arguments made by the RTC relating to those exceptions to be persuasive.

is in a letter written in April of 1992 by a French banking official. See Exh. R. to Malegeant Dec., at 2. All that letter says is that in order for the 1989 sale of Saudi European Bank to go through, "the Banking Commission considered that the purchaser should not have to assume the risks associated with certain loans granted to borrowers connected to the former stockholders." Defendant would have the court read this patently ambiguous statement as evidence that a formal decision by the French government immunized the defendant against the claims brought by the RTC. The letter simply does not permit the court to draw the inference advanced by the defendant.

The defendant has not sufficiently explained the statement in the letter and the statement, on its face, appears to have very little relevance to this case.[5] Defendant argues that an unspecified subsidiary of American Continental Corporation was a shareholder in the company that owned Saudi European Bank until 1989; that the deposits that the RTC seeks to recover in this case were made in

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[5] The statement on its face is unclear as to which "borrowers," which "certain loans," and what "risks" the statement references. The defendant has not seriously tried to clarify any of these ambiguities.

connection with certain loans or agreements made between Lincoln and Saudi European Bank; that, as evidenced by the French official's statement in 1992, the French government intended to cut-off claims by former shareholders; and that, therefore, the RTC's claims brought on behalf of Lincoln are barred.

But all the defendant has provided the court with is vague hints. Nothing other than counsel's representations tie the subject deposits to any loans made between Lincoln and the defendant, and nothing indicates that the "certain loans" which the French government was concerned about in 1989 relate to whatever loans the deposits in this case were allegedly linked with. Similarly, defendant proffers no evidence to establish that the French government intended to cut off any depositor claims, even those by former shareholders. In sum, the statement made by the French banking official cannot be read as a confirmation that the government somehow immunized the defendant against the plaintiff's claims either in 1989 or 1991.

Thus, defendant has not sufficiently contested what seems clear: that no act by the French government effected a taking of the

deposits which the plaintiff seeks to recover in this case.[6] Because the relevant facts relating to the deposit of money by Lincoln and its nonpayment by the defendant are not disputed, summary judgment is appropriate and, therefore, is granted.

. . . .

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[6] Defendant's counsel, Robert Ted parker, has submitted a declaration in opposition to the RTC's motion for summary judgment. Paragraph 5 of that declaration states that attached as an exhibit is a report prepared by Dr. Boris Kozolchyk of the University of Arizona, defendant's expert witness in similar litigation in Tucson. Dr. Kozolchyk opines that, as a result of the government-arranged sale of SEB in 1989, the defendant acquired certain "abstract rights," and that, to ensure the sale of a troubled bank, "the Banking commission had to ensure that the acquisition was immunized against underlying claims and defenses, much as is the case with other judicial purchases in French law." Exh. C to Parker Dec. at 7. Dr. Kozolchyk concludes that the act of state defense bars plaintiff's claims in the Tucson litigation. The RTC asks that the report not be considered because, among other reasons, the RTC noticed the deposition of Dr. Kozolchyk on December 7 and he failed to appear.

The court notes the following with respect to the report. First, nothing in the report relating to abstract rights or French law has been relied upon by the defendant in its responding papers in this litigation. Second, the assertion in the report about what the French banking officials may have done is not supported to an extent that the report has any persuasive value to this court. Third, because Dr. Kozolchyk's alleged failure to appear at his deposition has not been explained by the defendant, the court strikes the Parker declaration to the extent that it references the Kozolchyk report.

IT IS ORDERED granting the RTC's motion for summary judgment (Doc. 80).

DATED this 13 day of January 1993.

/s/ Robert C. Broomfield
Robert C. Broomfield
United States District Court

Copies to counsel of record

APPENDIX I

RULE 56. Summary Judgment

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on

file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

(f) When Affidavits are Unavailable. Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment

or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits Made in Bad Faith. Should is appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

(as amended Dec. 27, 1946, eff. Mar. 19, 1948; Jan. 21, 1963, eff. July 1, 1963; Mar. 2, 1987, eff. Aug. 1, 1987.)

(2)

Supreme Court, U.S.
FILED
AUG 19 1994
OFFICE OF THE CLERK

NO. 93-2050

IN THE SUPREME COURT OF THE UNITED STATES

October 1994 Term

SOCIÉTÉ DE BANQUE PRIVÉE, f/k/a SAUDI EUROPEAN BANK, S.A., a French Company, now known as Société d'Analyses et d'Etudes Bretonneau,

Petitioner,

v.

RESOLUTION TRUST CORPORATION, as conservator for Lincoln Savings and Loan, F.A., a Federal savings and loan association,

Respondent.

Petition for Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

Supplement to the Petition for Writ of Certiorari

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Supplement to the Petition for Writ of Certiorari

REFERENCE TO OPINION

The Court of Appeals opinion, Cristobal v. Siegel, ___ F.3d___, 94 C.D.O.S. 4693 (9th Cir. 1994), filed on June 23, 1994, is reprinted as Appendix A to this supplement to the petition.

JURISDICTION

The petition for a writ of certiorari was filed with the United States Supreme Court on June 22, 1994. Pursuant to Rule 15.7 of the Rules of the Supreme Court of the United States, this supplement to the petition for a writ of certiorari calls attention to case authority not available at the time of the filing, and is entered during the time the petition for writ of certiorari is still pending.

INTRODUCTION

We wish to call to the Court's attention a decision from the Ninth Circuit, Cristobal v. Siegel, ___ F.3d ___, 94 C.D.O.S. 4693 (9th Cir. 1994) (reprinted as Appendix A to this supplement), which has come down since our petition for writ of certiorari was filed. Cristobal reaffirms the Ninth Circuit's commitment to the rule of

law announced in Henry v. Gill Industries, Inc., 983 F.2d 943 (9th Cir. 1994). Specifically, unless a moving party's papers are sufficient to support its motion for summary judgment, a district court abuses its discretion by granting the motion pursuant to a local rule permitting it to deem the failure to file an opposition consent to granting the motion summarily. Cristobal categorically states that under no circumstances may summary judgment be entered unless the movant has met its initial burden under Rule 56 of the Federal Rules of Civil Procedure. Nominally, the disagreement we have with the panel that decided this appeal below is over the proper standard for summary judgment. The deeper concern, however, is whether the panel will be permitted to apply an indefensible summary judgment standard in order to evade the application of the Ninth Circuit's own clearly stated and well-settled rule of law regarding local rules of practice. We ask the Court to act to set right what any fair minded person can only conclude is a manifest miscarriage of justice.

ARGUMENT

The district court granted summary judgment against petitioner Bretonneau[1] as to its counterclaims on the basis of a local rule providing that the failure to file and serve an opposition may be deemed consent to granting the motion summarily. No opposition was filed because respondent Resolution Trust Corporation chose to serve its moving papers on the party Bretonneau directly, mailing them to an outdated Paris address, rather than on the attorney with whom they had been dealing and who they understood was to represent Bretonneau. As a consequence neither Bretonneau nor counsel knew a motion had been filed. Petition at 3-6.

In Henry, the Ninth Circuit held that it is an abuse of discretion to grant summary judgment pursuant to the local rule where the movant's papers are not sufficient to support the motion. In Henry, the moving papers were not sufficient to support the motion because they failed to satisfy the movant's initial burden under Rule 56 of the Federal Rules of Civil Procedure. The court

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[1] Société de Banque Privée, now known as Société d'Analyses et d'Etudes Bretonneau, referred to in our petition for writ of certiorari and in this supplementary brief as "Bretonneau."

reasoned that a local rule of practice could not contravene the requirements of Rule 56 regarding a movant's initial burden:

> The doubts expressed in these cases were founded on an appreciation of the interrelationship between Rule 56 and Rule 83. Federal Rule of Civil Procedure 83 invites the district courts to formulate local rules, but only insofar as they are not inconsistent with the federal rules themselves. Under Federal Rule of Civil Procedure 56, a moving party is entitled to summary judgment only upon a showing that there are no genuine issues of material fact requiring a trial. The party opposing the motion is under no obligation to offer affidavits or any other materials in support of its opposition. Summary judgment may be resisted and must be denied on no other grounds than that the movant has failed to meet its burden of demonstrating the absence of triable issues. A local rule that requires the entry of summary judgment simply because no papers opposing the motion are filed or served, and without regard to whether genuine issues of material fact exist, would be inconsistent with Rule 56, hence impermissible under Rule 83. See Hibernia Nat'l Bank v. Administracion Central Sociedad Anonima, 776 F.2d 1277, 1279 (5th Cir. 1985) ("A motion for summary judgment cannot be granted simply because there is no opposition, even if the failure to oppose violated a local rule.").
>
> In this case, as in Hamilton and Mutual Fund Investors, the local rule at issue does not require the court to grant a motion for summary judgment when the non-moving party fails to file and/or serve its opposition thereto. The language of the rule is permissive, conferring discretion upon the district judge to determine whether non-compliance should be

> deemed consent to a given motion. That discretion, however, is necessarily abused when exercised to grant a motion for summary judgment where the movant's papers are insufficient to support that motion or on their face reveal a genuine issue of material fact.

Henry, 983 F.2d at 949-50.

In Cristobal, the Superior Court of Guam entered summary judgment against plaintiffs, the Cristobals, pursuant to Guam Rule of Civil Procedure 56 (which tracks Federal Rule of Civil Procedure 56) and Guam Rule of Court 3(c), which provides that the failure to file a memorandum of points and authorities in opposition to a motion for summary judgment constitutes consent to granting the motion. The District Court of Guam Appellate Division affirmed. The Cristobals appealed to the Ninth Circuit.

The Ninth Circuit ruled that decisions interpreting Federal Rule of Civil Procedure 56 applied to Guam's analogous rule, and thus that Henry was controlling. 94 C.D.O.S. at 4694. The court emphasized that under Henry, summary judgment is never proper unless the movant satisfies its initial burden:

> Within the Ninth Circuit a federal trial court cannot grant summary judgment under the Federal Rules unless the moving party bears its burden of showing its entitlement to judgment.

Id. at 4694. The record before the court failed to show whether the Superior Court had evaluated the sufficiency of the moving papers. The court therefore reversed the Appellate Division's affirmance and remanded with instructions to remand in turn to the Superior Court for its independent determination as to the sufficiency of the movant's papers. 94 C.D.O.S. at 4696.

In so ruling, the court warned against misuse of the local rule:

> This court's deepest concern in this case is to see that the courts within this circuit do not use rules of practice as the basis for entering summary judgment without independently evaluating the sufficiency of the moving papers. Henry v. Gill Industries, Inc., 983 F.2d 943 (9th Cir. 1993).

94 C.D.O.S. at 4696.

In the present case, did the district court independently evaluate the sufficiency of RTC's moving papers? The record does not show that the district court gave any thought whatsoever to this question before applying the local rule.

Did the moving papers satisfy RTC's initial burden under Rule 56? RTC submitted no declarations and made no references to the pleadings or other materials. Instead, it simply stated that Bretonneau could not prove its case, and that as the party who would bear the burden at trial, had the burden of coming forward with evidence. RTC thus relied on an interpretation of Celotex v. Catrett, 477 U.S. 317 (1986) that has been uniformly and decisively rejected in the appellate decisions of other circuits. RTC's entire showing was the following statement from its memorandum of points and authorities:

> Banque Privee has asserted a setoff against the $8 million deposited by Lincoln Savings. That asserted setoff is the basis for Banque Privee's counterclaim. Banque Privee, however, bears the burden of presenting evidence to support that claim, failing which the claim must be rejected [citing Celotex, 477 U.S. at 322-23 and Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986)]. Inasmuch as there is no evidence in the record to sustain Banque Privee's claim, judgment must be entered against defendant on the counterclaim unless defendant comes forward in its response with evidence to support each element.

Petition, Appendix G at G-3.

As the Eleventh Circuit has pointed out, this is a mischaracterization of Celotex and is inconsistent with the rule of Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970).

Banque Privee had no burden of presenting evidence unless RTC first met its initial burden under Rule 56:

> The Court established an exception to the Adickes rule for this uncommon situation. We must emphatically state, however, that the Court did not overrule Adickes. Rather, the Court reiterated that "[o]f course, a party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." Id. at 323, 106 S.Ct. at 2553 (quoting Fed. R. Civ. P. 56(e)). No Justice in either the majority or the dissent in Celotex ever questioned that the Adickes rule remained the generally applicable rule.[] In fact, most of the discussion in both the majority and dissenting opinions concerned what constitutes a "showing" of the absence of a genuine issue of material fact sufficient to meet the movant's burden under Rule 56. See Celotex 477 U.S. at 323-25, 106 S.Ct. at 2553-54; id. at 331-33, 106 S.Ct. at 2557-58 (Brennan, J., dissenting); see also id. at 328-29, 106 S.Ct. at 2555 (White, J., concurring in opinion and judgment of Court).
>
> To summarize, the Adickes rule remains the general rule. The moving party bears the initial

> burden to show the district court, by reference to materials on file, that there are no genuine issues of material fact that should be decided at trial. Only when that burden has been met does the burden shift to the non-moving party to demonstrate that there is indeed a material issue of fact that precludes summary judgment. Celotex did not change the general rule. Celotex simply holds that under certain circumstances the movant may meet its Rule 56 burden without negating an element of the non-moving party's claim and that under such circumstances it is sufficient to point to materials on file that demonstrate that the party bearing the burden of proof at trial will not be able to meet that burden. Even after Celotex it is never enough simply to state that the non-moving party cannot meet its burden at trial.

Clark v. Coats & Clark, Inc., 929 F.2d 604, 608 (11th Cir. 1991) (footnote omitted).

As we have pointed out in our petition, both the Fifth and Eleventh Circuits have repeatedly held, in agreement with Justice White's concurring opinion in Celotex, that a conclusory assertion such as the one relied on by RTC in the present case does not satisfy a movant's initial burden under Rule 56. Petition at 12-16.

Henry held that a district court abuses its discretion when it grants summary judgment pursuant to the local rule when the movant has failed to meet its initial burden. Cristobal emphasizes the broader, categorical principle that leads to this conclusion: Under

no circumstances can a court ever grant summary judgment unless the moving party has met its initial burden under Rule 56.

The nominal dispute we have with the panel that decided this case is whether the statement from RTC's moving papers quoted supra satisfies RTC's initial burden under Rule 56. The panel says it does. We have pointed out to the panel that Justices White and Brennan and the Fifth and Eleventh Circuits would say it does not. We have asked the panel, in our petition for rehearing, how it is that to simply make an unsupported, conclusory assertion is to satisfy any burden at all. The panel has declined to respond.

We do not believe there is any conceivable reasoned basis for the position the panel has taken with regard to the standard for summary judgment, and therefore can only conclude that the panel has been pushed to this extreme in its determination not to apply the rule of law announced in Henry. Cristobal shows the Ninth Circuit's firm commitment to this rule of law, and reiterates that a district court cannot grant summary judgment unless it first independently evaluates the sufficiency of the moving papers and determines that the movant has met its initial burden under Rule 56.

Thus, while the nominal dispute is over the standard for summary judgment, the deeper question presented is whether the panel will be required to follow the Ninth Circuit's own rule of law.

The judgment in this case deprived Bretonneau of a meritorious counterclaim amounting to some $8 million. RTC achieved this judgment by serving its papers in a way the district court itself had to concede was suspect. Petition at 6, Appendix D at D-12. The panel's refusal to follow its own rule of law perpetuates a patent injustice. We ask the Court to issue its writ and reverse the judgment of the Court of Appeals.

Dated: August 12, 1994

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IN THE SUPREME COURT OF THE UNITED STATES

October 1994 Term

SOCIÉTÉ DE BANQUE PRIVÉE, f/k/a SAUDI EUROPEAN BANK, S.A., a French Company, now known as Société d'Analyses et d'Etudes Bretonneau,

Petitioner,

v.

RESOLUTION TRUST CORPORATION, as conservator for Lincoln Savings and Loan, F.A., a Federal savings and loan association,

Respondent.

Petition for Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

Appendix A to Supplement to the Petition for Writ of Certiorari

NINTH CIRCUIT COURT OF APPEALS

Cite as 94 C.D.O.S. 4693

ADRIAN L. CRISTOBAL, et al., Plaintiffs-Appellants,

v.

JEFFREY SIEGEL, et al., Defendants-Appellees.

No. 92-16642
United States Court of Appeals for the Ninth Circuit
D.C. No. CV-91-00095A
Appeal from the United States District Court for the District of Guam, Appellate Division, Hons. Brown, Munson, and Hatter, Judges, Presiding
Submitted November 3, 1993* Honolulu, Hawaii
Before: Cecil F. Poole, Charles Wiggins and Thomas G. Nelson, Circuit Judges.

COUNSEL

Peter F. Perez, Agana, Guam, for the plaintiffs-appellants.
Barry K. Tagawa, Long & Levit, San Francisco, California, for the defendants-appellees.
Filed June 23, 1994

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* Pursuant to Ninth Circuit Rule 34-4, the panel unanimously finds this case suitable for disposition without oral argument.

POOLE, Circuit Judge:

Appellants ("the Cristobals") challenge an order of the District Court of Guam Appellate Division ("Appellate Division") affirming the grant of summary judgment by the Superior Court of Guam ("Guam Superior Court") in favor of Appellees Jeffrey Siegel, Francis Gill, Brian Hanohano, and Coral Pit, Inc. ("Coral Pit"). Coral Pit filed a motion for summary judgment in early January 1991. The Cristobals failed to file a timely memorandum of points and authorities in opposition to the motion. Guam Rule of Court 3(c) provides that failure to file a memorandum of points and authorities in opposition to a motion constitutes consent to the granting of that motion. The Guam Superior Court deemed that the Cristobals had consented to Coral Pit's motion for summary judgment under Rule 3(c) because the Cristobals did not file opposition papers and entered summary judgment in favor of Coral Pit. We reverse and remand.

I. FACTUAL & PROCEDURAL BACKGROUND

This appeal arises out of protracted litigation regarding a lease agreement. The Cristobals brought suit against Coral Pit in

June 1988 alleging fraud, cancellation of instruments, forgery, and slander of title. Coral Pit counterclaimed to have title of property quieted in Coral Pit. By August 1989 Coral Pit had successfully obtained either summary judgment for or dismissal of each of the Cristobals' causes of action.

Subsequently, the parties began settlement negotiations. On March 12, 1990, the Cristobals' counsel, Lawrence Teker ("Teker"), wrote to Coral Pit's counsel, Thomas J. Lannen ("Lannen"), confirming that he had met with the Cristobals, that they agreed to a settlement proposal, but that they were reviewing the final document.

On March 16, 1990, Teker again wrote to Lannen, stating "As I mentioned I still don't have the authority to give you this letter but I think I will." Attached was an unsigned letter proposing a settlement dated March 9, 1990.

On April 2, 1990, Lannen's office received a copy of the March 9, 1990 letter proposing settlement, this time signed by Teker. Lannen responded in an April 24, 1990 letter stating, "On behalf of all the defendants, the offer is hereby accepted." After

reiterating the terms set out in Teker's letter, Lannen closed by noting "I believe the parties all agree to add two additional terms, which have always been included in past discussions." These terms included a letter from Judge Lamorena, one of "the Cristobals," absolving Coral Pit of any fraud, and an agreement that the Cristobals would not oppose rezoning of the property. We have no record of Teker's response, if any.

Nearly five months later, on September 13, 1990, Lannen again wrote to Teker, this time complaining of the Cristobals' delay in reviewing and executing "the Settlement Agreement." Lannen stated that regardless of whether a settlement agreement were executed, "it is our position that a settlement of this matter has been reached. While I believe our correspondence clearly reflects our agreement, should there be any doubt, this is again to affirm that we accept your offer of settlement as set forth in your March 9, 1990 letter which you delivered on your client's behalf." Lannen warned that if the settlement documents were not forthcoming that he would seek court enforcement of the settlement.

On September 20, 1990, David Lujan ("Lujan") wrote to Lannen informing him that he had replaced Teker as counsel for the Cristobals, and that his clients rejected any settlement discussed between Teker and Lannen. Lujan formally appeared as counsel of record for the Cristobals on September 27, 1990.

On January 3, 1991, Coral Pit filed a motion for summary judgment seeking enforcement of the purported settlement agreement. Attached to the motion were copies of the letters described above. The motion was noticed for hearing on January 17, 1991. The Cristobals had until January 10, 1991 to file their response, or a motion for leave to file a late brief. Not until January 15, 1991 did the Cristobals file a motion to permit late filing of their opposition papers, as well as an ex parte application for order shortening time for hearing on that motion.

The Guam Superior Court heard the motion to permit late filing on January 15, 1991. First, the court continued the summary judgment hearing from January 17, 1991 to January 24, 1991. Then the court denied the motion to permit late-filed opposition. Then the court deemed the motion for summary judgment consented to under

Rule of Court 3(c). According to the court this "consent" to summary judgment mooted the summary judgment hearing scheduled for January 24, 1991. On this basis the court granted summary judgment to Coral Pit.

The Cristobals filed a motion for reconsideration, but then withdrew the motion because no final judgment had been entered pursuant to Guam Rule of Civil Procedure 59(e). On May 17, 1991 the Cristobals moved for entry of final judgment pursuant to Guam Rule of Civil Procedure 54(b). The Guam Superior Court entered a judgment enforcing the terms of the alleged settlement agreement on October 9, 1991. The Cristobals filed a notice of appeal to the Appellate Division on November 13, 1991. The Appellate Division affirmed the Guam Superior Court's entry of summary judgment holding that the Guam Superior Court did not err when it found that there was no excusable neglect in the Cristobals' failure to timely file an opposition to Coral Pit's motion for summary judgment. The Cristobals timely appealed to this court.

II. STANDARD OF REVIEW

Guam v. Yang, 850 F.2d 507, 511 (9th Cir. 1988) (en banc) established that this court reviews the interpretations of Guam law by the District Court of Guam Appellate Division de novo. This court reviews the decision of the trial court, the Guam Superior Court, as if it had not been heard previously by an appellate court. Guam v. Ignacio, 10 F.3d 608, 611 (9th Cir. 1993); accord Aguon v. Calvo, 951 F.2d 1131, 1132-33 (9th Cir. 1991) (after remand to Guam Superior Court "to obtain the benefit of the lower courts' construction of the Guam Marketable Title Act, we must now review that construction de novo."); Petition of Government of Guam, 869 F.2d 1326, 1327 (9th Cir. 1989) (de novo review of Guam Superior Court's interpretation of Guam Civil Code).

Coral Pit argues that this case turns on an interpretation of local procedural rules, specifically whether the Guam Superior Court erred in finding no excusable neglect by the Cristobals' counsel when failing to file opposition papers. Consequently, Coral Pit urges the panel to apply an abuse of discretion standard. In Lynn v. Chin Heung International, Inc., 852 F.2d 1221, 1222 (9th Cir. 1988)

and Guam Sasaki Corp. v. Diana's Inc., 881 F.2d 713, 716 (9th Cir. 1989), however, we carefully distinguished between the deference owed to local rules regarding "the methodology of docket management adopted by the local courts," (abuse of discretion) and local rules which govern "challenges to the substantive sufficiency of pleadings" (de novo). Lynn, 852 F.2d at 1222. Since a motion for summary judgment challenges the substantive sufficiency of a complaint, we review the Guam Superior Court's grant of summary judgment de novo. See Hyon-Su v. Maeda Pacific Corp., 905 F.2d 302, 304 (9th Cir. 1990) (grant of summary judgment by Guam Superior Court reviewed de novo).

III. DISCUSSION

A. Summary Judgment and Rules of Practice

Within the Ninth Circuit a federal trial court cannot grant summary judgment under the Federal Rules unless the moving party bears the burden of showing its entitlement to judgment.

> A local rule that requires the entry of summary judgment simply because no papers opposing the motion are filed or served, and without regard to whether genuine issues of material fact exist, would be inconsistent with Rule 56, hence impermissible

> under Rule 83 [which prohibits rules of court inconsistent with the Fed. R. Civ. P.].

Henry v. Gill Industries, Inc., 983 F.2d 943, 950 (9th Cir. 1993) (construing the Federal Rules); See also Hoover v. Switlik Parachute Co., 663 F.2d 964, 967 (9th Cir. 1981) (where no opposition to motion filed, summary judgment still inappropriate if there is insufficient evidence to support the motion). For reasons which we elaborate below, this Ninth Circuit construction of the Federal Rules of Civil Procedure applies to Guam Rule of Civil Procedure 56. Consequently, the Guam Superior Court erred by granting summary judgment based on the Cristobals' "consent," because this consent was only a constructive consent based on the strict application of Guam Rule of Court 3(c). This application of Guam Rule of Court 3(c) relieved Coral Pit of its burden to demonstrate its entitlement to summary judgment and the trial court of its responsibility to independently evaluate the sufficiency of the motion, contrary to the Ninth Circuit's substantive requirements for summary judgment.

1. Relationship Between the Guam Rules of Court and the Guam Rules of Civil Procedure

Coral Pit argues that our interpretation of the relationship between the Federal Rules of Civil Procedure and local federal court rules should not govern the relationship between the Guam Rules of Civil Procedure and the Guam Rules of Court because the Guam Rules of Court supersede the Guam Rules of Civil Procedure.

Coral Pit's argument depends upon a tortured reading of the former Guam Rule of Court 1, in force at the time of the Guam Superior Court's decision, which provided that "All rules in conflict with these rules shall be of no further force or effect to the extent of the conflict." Coral Pit urges us to read this clause to mean that the Guam Rules of Court supersede the Guam Rules of Civil Procedure.

We do not read the clause so broadly. The former Guam Rule of Court 1 should be read as nullifying all other rules of practice inconsistent with the Rules of Court. Were Guam Rule of Court 1 read to make the Guam Rules of Court preeminent over the Guam Rules of Civil Procedure by virtue of this one clause we might be opening the door to conflicting interpretations between the

Guam Rules of Court and the Guam Rules of Evidence, the Guam Rules of Probate, etc. We decline to open that door.

The legislature expressed this concern in its enabling statute for the Guam Rules of Court. The enabling statute says that rules promulgated under its authority shall not abridge, enlarge, or modify any substantive right. To deem consent to a grant of summary judgment on the basis of a rule of practice modifies a litigant's substantive rights.[1]

Coral Pit notes that their argument is specifically supported by the commentary to the recently revised Guam Rules of Court which states that the Guam Rules of Court which were in effect at the time of defendants' motion for summary judgment "were, according to their own terms, superior to the Rules of Civil Procedure. The new rules expressly provide to the contrary." This commentary by itself, however, is less persuasive than the practice

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[1] In their briefs the Cristobals question the basic legitimacy of the Guam Rules of Court purportedly in effect at the time of the summary judgment motion. Specifically, the 1979 Rules of Court purport to derive their authority from Guam Code Civ. P. § 123, a statute which had been repealed for five years prior to promulgation of the Guam Rules of Court. The repeal, however, was in fact a recodification. A nearly identical authorizing statute is found in Guam Code Civ. P. § 66.

of the Guam Superior Court which itself recognized the supremacy of the Rules of Procedure over the Rules of Court as outlined in Guam Rule of Civil Procedure 83. We take judicial notice of the fact that on at least one occasion, a majority of Guam Superior Court judges amended the Rules of Court pursuant to Rule 83.

Finally, Coral Pit argues that the 1979 Guam Rules of Court, which were in effect at the time the Guam Superior Court ruled on the motion for summary judgment, had been promulgated by the Judicial Council after the Guam Rules of Civil Procedure, and therefore the legislative decree of Guam Rule of Court 1 supersedes the previously enacted Rules of Civil Procedure. This is false. Coral Pit argues from the erroneous belief that the 1974 Rules of Civil Procedure governed. New Rules of Civil Procedure took effect in 1990, after the 1979 Rules of Court. See 7 Guam Code Ann. A-1, A-2, B-1.

Consequently, we conclude that the Guam Rules of Court which were in effect at the time the Guam Superior Court considered the motion for summary judgment were rules of practice which did

not supersede the substantive requirements of the Guam Rules of Civil Procedure.

2. Ninth Circuit Precedent

Coral Pit argues that even if Guam Rule of Civil Procedure 56 applies to this case that Ninth Circuit interpretations of Federal Rule of Civil Procedure 56 do not. According to Coral Pit, Lynn v. Chin Heung International, Inc., 852 F.2d 1221 (9th Cir. 1988) established that the Ninth Circuit should defer to interpretations of the Guam Superior Court which "studiously avoid[] recent and obvious Ninth Circuit authority in favor of original analysis." Id. at 1223. We read Lynn, however, as establishing a test which requires deference to original analysis in matters of peculiarly local importance, and less deference when interpreting rules which closely track the federal rules and "which govern[] challenges to the substantive sufficiency of pleadings." Id. at 1222. Since Guam Rule of Civil Procedure 56 closely tracks a federal rule, and governs challenges to the substantive sufficiency of an action, Ninth Circuit authority regarding the analogous federal rule appropriately governs interpretation of Guam Rule of Civil Procedure 56. We have

repeatedly held that in cases from Guam "[a] grant of summary judgment is . . . reviewed de novo, using the same standard employed by the trial court under Fed. R. Civ. P. 56(c)." Hyon-Su v. Maeda Pacific Corp., 905 F.2d 302, 304 (9th Cir. 1990) (citations omitted); See also, Unpingco v. Hong Kong Macau Corp., 935 F.2d 1043, 1045 (9th Cir. 1991) ("Where a Guam rule of civil procedure tracks a federal rule of civil procedure, we look to relevant Ninth Circuit law on the latter in interpreting the former. We review a grant of summary judgment de novo." (citations omitted). Therefore, the analogous Federal Rules case of Henry v. Gill Industries, Inc., 983 F.2d 943 (9th Cir. 1993), governs our interpretation of Guam Rule of Civil Procedure 56 in this case.

3. Right to Argue Issue on Appeal

Coral Pit also argues that the Cristobals are barred from raising the issue of the conflict between Guam Rule of Civil Procedure 56 and Guam Rule of Court 3(c) for the first time on appeal. Although we typically do not consider issues on appeal which were not presented to the trial court, we have discretion to consider matters of law never considered prior to appeal. See, e.g.,

Smiley v. Director, Office of Workers Compensation Programs, 984 F.2d 278, 281 (9th Cir. 1993). This conflict between the rules is an issue of law derived in part from our recent decision in Henry v. Gill Industries, Inc., 983 F.2d 943 (9th Cir. 1993), which was decided "during the pendency of the appeal." United States v. Patrin, 575 F.2d 708, 712 (9th Cir. 1978). This issue is properly before the court.

The Guam Rules of Court which were in effect at the time of that the Guam Superior Court heard the motion for summary judgment are rules of practice which did not supersede the substantive requirements of Guam Rule of Civil Procedure 56. Moreover, Guam Rule of Civil Procedure 56 is governed by Ninth Circuit precedent for the analogous federal rule. Accordingly, we conclude that the trial court erred when it entered summary judgment in favor of Coral Pit solely because it deemed that the Cristobals had consented to the motion on the basis of Guam Rule

of Court 3(c). Henry v. Gill Industries, Inc., 983 F.2d 943, 950 (9th Cir. 1993).[2]

B. Exclusion of Opposing Affidavit

The Cristobals argue that the trial court erroneously excluded an opposing affidavit. Although a court has discretion to permit late papers in opposition, Guam R. Civ.P.56(c) and Guam Rules of Court 3(a) allow affidavits to be served until the day prior to a hearing without the permission of the court. The Cristobals argue that when the Guam Superior Court mooted the hearing on summary judgment that it effectively denied the possibility of serving an affidavit in opposition, in contravention of Rule 56(c). This argument is not frivolous, but nothing in the record indicates that the Cristobals ever proffered an affidavit, even though they claim that it was available at the January 15, 1991 hearing. Inasmuch as it relates to the relationship between the deemed consent mandated by Guam Rule of Court 3(c) and the substantive requirements of Guam

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[2] Our decision in Brydges v. Lewis, 18 F.3d 651 (9th Cir. 1994) is not to the contrary. In Brydges the local rule was permissive rather than mandatory, and the trial court warned the plaintiff in advance of the consequences of his failure to respond. Guam Rule of Court 3(c) is mandatory, and nothing in the record indicates that the Cristobals were warned by the trial court.

Rule of Civil Procedure 56, this issue is addressed elsewhere. Since the prepared affidavit was never offered, the court's preclusion of the affidavit by itself does not provide a basis for reversal.

C. Coral Pit's Entitlement to Summary Judgment

The Cristobals argue on appeal that Coral Pit's moving papers did not establish an entitlement to summary judgment. First, the Cristobals argue that Coral Pit's moving papers did not meet the formal requirements of the statute because the attached documents were unauthenticated. Second, they argue that even if the papers were accepted at face value, the papers failed to establish the absence of any genuine issues of material fact. Finally, the Cristobals argue that the papers failed to show that Coral Pit was entitled to judgment as a matter of law.[3]

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[3] Coral Pit argues that issues related to the sufficiency of the motion for summary judgment should not be considered on this appeal because they were never presented to the Guam Superior Court, and were presented for the first time on appeal to the Appellate Division. Ultimately our disposition of these issues accords with the prudential reasons behind this argument. Nonetheless, we must note that since the core issue which we decide today stems from how the Guam Superior Court truncated consideration of the motion for summary judgment when it deemed it consented to and disposed of the hearing. It would surprise us if the Cristobals had raised these issues before that court. We can decide whether the Guam Superior Court itself had an obligation to address the sufficiency of the motion for summary judgment. Compare Smiley v. Director, 984 F.2d 278, 281 (Ninth Circuit will consider on appeal an issue of law which administrative board had an obligation to address sua sponte).

1. Facial Sufficiency

Guam Rule of Civil Procedure 56(e) requires that "[s]upporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify on the matters stated therein." The Cristobals contend that Coral Pit's moving papers were not supported by any authenticated documents. Coral Pit argues that a party can waive the authentication requirements of Rule 56(e) if no objection is raised before the trial court. Townsend v. Columbia Operations, 667 F.2d 844, 849 (9th Cir. 1982) ("even if [documents] were not presented in compliance with Fed. R. Civ P. 56(e), they would support a summary judgment in the absence of objection to their use").

Although the Ninth Circuit has never directly rejected Townsend, supra, on this point, it is outweighed by the Ninth Circuit's more recent and consistent holding that a court should deny a motion for summary judgment if "the movant's papers are insufficient on their face..." Sheet Metal Workers' Int'l Ass'n. v. Nat'l Labor Relations Bd., 716 F.2d 1249, 1254 (9th Cir. 1983)

(citations omitted). "This court has consistently held that documents which have not had a proper foundation laid to authenticate them cannot support a motion for summary judgment." Canada v. Blain's Helicopters, Inc., 831 F.2d 920, 925 (9th Cir. 1987); cf. Hal Roach Studios, Inc. v. Richard Feiner and Co., Inc., 896 F.2d 1542, 1550-51 (9th Cir. 1990) (unauthenticated document should not support a motion for summary judgment, but error harmless where both sides offer same document); White by White v. Pierce County, 797 F.2d 812, 815 (9th Cir. 1986) (unauthenticated documents cannot support opposition to motion for summary judgment).

Coral Pit argues, however, that authenticity is not disputed, and that the Cristobals themselves adopt the same exhibits in their Opening Brief before the Appellate Division. In Hal Roach Studios, Inc. v. Richard Feiner and Co., Inc., 896 F.2d 1542, 1550-51 (9th Cir. 1990) this court held that use of unauthenticated documents for summary judgment was harmless error where both sides relied on the same documents. Although the Cristobals did not rely on the same documents at the time summary judgment was granted, they have since, so the question of authentication is moot. Although the

Superior Court arguably erred when it decided with only unauthenticated documents, Townsend provided arguable authority for its decision. Since the Cristobal's ultimately adopted the same documents, we conclude that this was not reversible error.

2. Issues of Material Fact and Entitlement as a Matter of Law

Guam Rule of Civil Procedure 56(c) allows summary judgment if "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." The Cristobals contend that Coral Pit's motion for summary judgment failed to establish the absence of any question of material fact, and failed to establish an entitlement to summery judgment as a matter of law. Interpreting Federal Rule of Civil Procedure 56 the Ninth Circuit has held that it is "the burden of the moving party to demonstrate the absence of any material fact." Hoover v. Switlik Parachute Co., 663 F.2d 964, 967 (9th Cir. 1981). This is true, even when the party against whom the motion for summary judgment is directed has not filed any opposition. See Sheet Metal Workers' Int'l Ass'n. v. Nat'l Labor Relations Bd., 716 F.2d 1249, 1254 (9th Cir. 1983). A court should deny a motion for summary

judgment if "the movant's papers...themselves demonstrate the existence of a material issue of fact." Id. (citations omitted).[4]

The Cristobals claim that Coral Pit's moving papers which relied on letters between the parties' attorneys demonstrated an unresolved and material factual issue regarding the authority of the Cristobal's first attorney, Teker, to reach a settlement agreement. Coral Pit, on the other hand, notes that a majority of jurisdictions recognize a rebuttable presumption that a client authorizes a settlement entered into by client's attorney. See, e.g., Capital Dredge and Dock Corp. v. City of Detroit, 800 F.2d 525, 530-31 (6th Cir. 1986) ("Generally, when a client hires an attorney and holds him out as counsel representing him in a matter . . . [t]he third party may rely on the attorney's apparent authority unless he has reason to believe that the attorney has no authority to negotiate a settlement.")

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[4] Although dicta in Franklin v. Murphy, 745 F.2d 1221 (9th Cir. 1984), and White by White v. Pierce County, 797 F.2d 812, 815 (9th Cir. 1986) suggest that failure to respond to a motion for summary judgment might justify granting the motion, it is clear that in both cases the trial and appellate courts carefully evaluated the moving papers and determined that there was no issue of material fact. See especially White by White v. Pierce County, 797 F.2d at 815 ("Even in the absence of opposing affidavits, summary judgment is inappropriate where the movant's papers are insufficient on their face").

The Cristobals argue, however, that determination of apparent authority is an issue of fact (Nat'l Labor Relations Bd. v. Donkin's Inn, Inc., 532 F.2d 138, 141, cert. denied 429 U.S. 895 (9th Cir. 1976) which in this instance went undetermined because the Guam Superior Court acted as though there were no issues of fact to resolve. The Cristobals argue that any presumption in favor of Teker's apparent authority "burst" when Teker wrote to Lannen on March 16, 1990: "As I mentioned I still don't have the authority to give you this letter but I think I will." Under this theory Teker had no authority until it was explicitly reinstated. Guam Code Civ. § 1963(32); Rauer v. Rynd, 27 Cal. App. 556, 150 P. 780 (1915) (interpreting Cal. Civ. Code § 1963 (now codified as Cal. Civ. Code § 3547).[5] The Cristobals argue that this "bursting bubble" or Thayer theory of presumption governs this situation because the presumptions of fact before the Superior Court are governed by the Guam Rules of Evidence, 6 G.C.A. § 301, which track the Federal

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[5] Guam adopted many of its statutes from California statutes. California interpretations following adoption are persuasive. See, e.g., Guam Hakubotan, Inc. v. Furusawa Inv. Corp., 947 F.2d 398, 401 (9th Cir. 1991), cert. denied 112 S. Ct. 1996 (1992).

Rule, and that the Federal Rule embodies the "bursting bubble" approach to presumption. Compare In re Yoder, 758 F.2d 1114, 1118-20 (6th Cir. 1985). In the alternative, the Cristobals argue that Teker's statement at the very least created a presumption which shifted the burden of proof regarding Teker's authority onto Coral Pit.

The Cristobals also contend that Coral Pit was not entitled to a grant of summary judgment as a matter of law because Coral Pit had not accepted the settlement agreement which forms the basis for this summary judgment. Specifically, by adding additional terms in their acceptance letter, Coral Pit's supposed acceptance is, as a matter of law, a counter-offer. Coral Pit argues, however, that the acceptance of the proposed terms was clear and unconditional, and that acceptance did not hinge on the additional, separable terms.

Courts have authority to enforce settlement agreements. See In re: City Equities Anaheim, Ltd., No. 92-56266, 1994 WL 145112 at *2 (9th Cir. April 26, 1994); Wilkinson v. F.B.I., 922 F.2d 555, 557 (9th Cir. 1991). The issue contested here is whether there was an enforceable agreement as a matter of law. This dispute focuses

exclusively on whether the two terms added in the second to last paragraph of Lannen's letter of April 24, 1990 qualify his acceptance and constitute a counter-offer. (See, e.g., Landberg v. Landberg, 24 Cal. App. 3d 742, 750, 101 Cal. Rptr. 335 (1972) or whether the letter is an unequivocal acceptance with an expressed desire for different terms which binds the parties (see, e.g., Chicago Bridge & Iron Co. v. Indus. Accident Comm'n, 226 Cal. App. 2d 309, 316 n. 2, 38 Cal. Rptr. 57 (1964)). The Cristobals argue that these added terms are material terms, and that materiality, not the conditionality of the language, should govern whether the terms are treated as a counter-offer. Bartone v. Taylor-Benson-Jones Co., 119 Cal. App. 2d 79, 258 P.2d 1054 (1953).

These issues, i.e., the existence of Teker's authority to settle the suit, and the enforceability of the purported settlement agreement as a matter of law, turn on interpretation of the Guam's substantive law of agency, professional responsibility, evidence, and contracts. We recognize the local Guam courts as uniquely qualified to resolve the many statutory and common law issues raised in the Cristobals appeal. Because the Superior Court deemed the Cristobals to have

consented to the motion for summary judgment on the basis of its Rules of Court we review a record which leaves us bereft of the trial court's wisdom on these issues.

As noted above, we review these issues de novo. Nonetheless, our power to decide the law in this case is tempered by our concerns for comity. In Guam v. Yang, 850 F.2d 507, 510 (9th Cir. 1988) (en banc) we noted that "Congress has specifically required that relations between the federal courts and Guam's local courts be the same as those between the federal and state courts." Although this is not functionally accurate because of this court's direct appellate authority over Guam's local courts, the concern for comity expressed by Congress, and by this court, teaches us that this court need not address some issues of peculiarly local concern. Cf., Lynn v. Chin Hueng International, Inc., 852 F.2d 1221 (9th Cir. 1988) (Ninth Circuit gloss in a matter of peculiarly local importance and broad discretion not binding on Guam Courts).

This court's deepest concern in this case is to see that courts within this circuit do not use rules of practice as the basis for entering summary judgment without independently evaluating the

sufficiency of the moving papers. Henry v. Gill Industries, Inc., 983 F.2d 943 (9th Cir. 1993). This case perfectly demonstrates the prudence of such a rule. Bereft of the trial court's independent evaluation of the merits of summary judgment an appellate panel is left to decide the issues with only a meager record and bickering briefs. The Cristobals have asked this panel to address the sufficiency of the entry of summary judgment, and by doing so have invited this panel to create precedent for Guam regarding the law of agency, professional responsibility, evidence, and contracts without any guidance from the local courts regarding the application of Guam law to this set of facts. Although we recognize our right to establish binding precedent, we decline the invitation to do so.

IV. CONCLUSION

We hereby REVERSE the order affirming the Superior Court's entry of summary judgment and REMAND to District court of Guam Appellate Division with instructions to REMAND to the Superior Court of Guam for its independent determination of Coral Pit's entitlement to summary judgment.

(3)

Supreme Court, U.S.
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No. 93-2050

In the Supreme Court of the United States

OCTOBER TERM, 1994

SOCIÉTÉ D'ANALYSES ET D'ETUDES BRETONNEAU,
PETITIONER

v.

RESOLUTION TRUST CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESOLUTION TRUST CORPORATION IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals erred in affirming the district court's grant of summary judgment in favor of the RTC.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A9) is unpublished, but the decision is noted at 19 F.3d 1441 (Table). The opinions of the district court (Pet. App. C1-C3, D1-D14, and H1-H14) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 15, 1994. A petition for rehearing was denied on May 3, 1994. Pet. App. B1-B2. The petition for a writ of certiorari was filed on June 22, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Lincoln Savings and Loan Association deposited $8 million with petitioner in two transactions in 1985 and 1989.[1] Pet. App. H2; Gov't C.A. Br. 2. Lincoln was placed in conservatorship in April, 1989; it later failed, and was placed in receivership. Federal banking regulators chartered a successor institution, Lincoln Savings and Loan Association, F.A. (New Lincoln), which purchased Lincoln's assets. The Resolution Trust Corporation (RTC) was appointed conservator for New Lincoln, and filed this action against petitioner in April, 1990, to recover the $8 million in deposits. Gov't C.A. Br. 2; see C.A. Exe. Rec. 120. Petitioner's answer claimed a set-off arising from loan participation agreements between it and Lincoln, and asserted several counterclaims based on allegedly unsatisfied obligations under those agreements. Pet. App. H2.

In late 1991, petitioner's original law firm was permitted to withdraw without substitution of counsel. Pet. App. D2. Before withdrawing, the firm requested that the district court, the RTC, and the RTC's counsel send all documents and correspondence in the litigation to petitioner's current counsel. Petitioner's new counsel did not, however, file an appearance in the district court until June 29, 1992. *Ibid.* In the interim, he told the RTC's counsel in repeated conversations in late 1991 and early 1992 that he had not yet been asked by petitioner to enter an appearance in this litigation. *Ibid.*

On February 20, 1992, the RTC filed a motion to modify the district court's scheduling order, explaining that it intended to file a motion for summary judgment

[1] Petitioner is the French corporate successor to Société de Banque Priveé, which in turn was created in the restructuring of the former Saudi European Bank. Pet. 3.

within 30 days. Pet. App. D3. The RTC served the motion to modify by mailing a copy to petitioner at its Champs-Elysees address in Paris. Petitioner received the motion, and forwarded a copy to its current counsel. *Ibid.* It evidently did not, however, instruct counsel to enter an appearance in the lawsuit at that time. The RTC filed its motion for summary judgment on March 27, 1992, and served it by mail on petitioner at the same Champs-Elysees address. Petitioner contends that it never received that motion. In any event, it filed no opposition with the district court. *Ibid.*

Rule 11(i) of the district court's Local Rules of Practice (Pet. 3) provides that a party that fails to serve and file a response to a motion may be deemed to consent to the granting of the motion. In the absence of any response from petitioner, the district court on June 12, 1992, found the RTC's motion "well-taken" and granted it both as to the RTC's claim for the funds on deposit and as to petitioner's counterclaims. Pet. App. C2. Court personnel sent a copy of the order granting the motion to petitioner's counsel, even though he had not at that point entered an appearance. *Id.* at D3-D4.

On June 29, 1992, petitioner's counsel filed an appearance in the district court. Pet. App. D2. On July 22, 1992, petitioner filed a motion to vacate the summary judgment pursuant to Fed. R. Civ. P. 60(b), contending that its failure to respond to the motion for summary judgment was the result of "excusable neglect," and that it could present a meritorious defense. Pet. App. D4; see C.A. Exe. Rec. 126. After briefing and argument, the district court granted in part the motion to vacate. The court vacated its judgment on the RTC's claim in order to permit petitioner to argue that it was insulated from liability on pre-reorganization deposits by the "act of

state" doctrine. Pet. App. D10. Petitioner was not, however, permitted to re-open any other issue. *Ibid.*

Petitioner later moved to amend the court's order to permit it to raise other issues, including its set-off argument and counterclaims, but the district court denied that motion after argument. Pet. App. E1, F1; see C.A. Exe. Rec. 50-69 (transcript of hearing). The court set a briefing and discovery schedule that culminated in a new hearing on the RTC's motion for summary judgment in January, 1993. Pet. App. E1. On January 14, 1993, the district court rejected petitioner's arguments under the "act of state" doctrine, and again refused to consider its assertion that French law would recognize a right to set off the deposited funds against amounts allegedly owed under Lincoln's loan participation agreements. *Id.* at H1, H4, H7-13.

2. The court of appeals affirmed. Pet. App. A1-A9. The court noted that summary judgment under Local Rule 11(i) would be inappropriate if the movant's papers were insufficient or themselves revealed a genuine issue of fact for trial, but held that the district court had not abused its discretion in this case because "the RTC's papers were sufficient to support granting the motion, as the district court found." Pet. App. A4. Relying on its construction of Local Rule 11(i) in a prior case that determined that the rule, so construed, was consistent with the Federal Rules of Civil Procedure, the court in this case concluded that "it cannot now be said that the rule is unconstitutional." Pet. App. A4.

The court of appeals also rejected (Pet. App. A5) petitioner's argument that the district court's ruling reopening its judgment under Rule 60(b) was improperly limited in scope:

> Given the manner in which [petitioner] conducted this litigation before current counsel became of

> record, we are of the opinion that the district court, after it made its extensive analysis of the situation, could properly have denied any reopening of the first summary judgment. Thus, we fail to see how [petitioner] was prejudiced by the court's decision to open it only in part.

The court then proceeded to consider (Pet. App. A6-A9) petitioner's arguments under the "act of state" doctrine. Because it determined that "[t]he record does not establish that the French banking authority compelled [petitioner] to repudiate its obligations to the RTC," the court found no "act of state" that would preclude payment to the RTC, and therefore affirmed the district court's grant of summary judgment for the RTC on that issue. *Id.* at A8-A9.

ARGUMENT

Petitioner does not challenge the court of appeals' ruling on the merits of its claim under the "act of state" doctrine. Instead, petitioner argues that the court erred in affirming the grant of summary judgment against petitioner because the RTC's motion papers were inadequate under Fed. R. Civ. P. 56 and *Celotex Corp.* v. *Catrett*, 477 U.S. 317 (1986).

1. Petitioner contends (Pet. 11-16) that the decision below conflicts with decisions from the Fifth and Eleventh Circuits, which state that a conclusory assertion that the opposing party has no evidence to prove its case is insufficient to discharge the moving party's initial burden on summary judgment. See *Ashe* v. *Corley*, 992 F.2d 540, 544 (5th Cir. 1993); *United States* v. *Four Parcels of Real Property*, 941 F.2d 1428, 1438 n.19 (11th Cir. 1991) (en banc); see also *Celotex*, 477 U.S. at 328 (White, J., concurring). Nothing in the court of

appeals' opinion suggests, however, that the Ninth Circuit takes a contrary view of the law.

Indeed, the court relied in this case (Pet. App. A4) on its prior decision in *Henry* v. *Gill Indus., Inc.*, 983 F.2d 943, 950 (1993), in which it held that under Rule 56

> The party opposing [a] motion [for summary judgment] is under no obligation to offer affidavits or any other materials in support of its opposition. Summary judgment may be resisted and must be denied on no other grounds than that the movant has failed to meet its burden of demonstrating the absence of triable issues.

Similarly, in *United States* v. *Wilson*, 881 F.2d 596 (9th Cir. 1989), the court made clear that "[t]he moving party 'bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of [the record] which it believes demonstrate the absence of a genuine issue of material fact.'" *Id.* at 601 (quoting *Celotex*, 477 U.S. at 323). There is no material difference between the standards announced in *Henry* and *Wilson* and those articulated in the Fifth and Eleventh Circuit cases cited by petitioner.[2]

2. In *Henry*, the court considered the same local rule applied by the district court in this case. In construing the rule so that it would not conflict with Rule 56, *Henry* held that a district court would "necessarily" abuse its discretion if it granted a motion for summary judgment under Rule 11(i) "where the movant's papers are insufficient to support that motion or on their face reveal a genuine issue of material fact." 983 F.2d at 950. The

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[2] *Cristobal* v. *Siegel*, 26 F.3d 1488 (9th Cir. 1993), upon which petitioner bases its Supplement to the Petition for Writ of Certiorari, is a routine application of *Henry*. See Supp. Pet. App. 8-9, 25-26.

court below quoted and applied the same standard in this case. Pet. App. A4.[3]

The RTC's position in this case was straightforward: it had deposited funds with petitioner, and it was entitled to their return. Pet. App. G2-G3; see generally *Bank of Marin* v. *England*, 385 U.S. 99, 101 (1966); *Texas Commerce Bank-Hurst, N.A.* v. *United States*, 703 F. Supp. 592, 594 (N.D. Tex. 1988) (depositor had right to direct disbursement of funds), aff'd, 896 F.2d 152 (5th Cir. 1990). The facts governing the deposit issue were undisputed; even now, petitioner does not take issue with any factual element relating to the RTC's basic claim.

Petitioner instead suggests (Pet. 14 n.3) that it was entitled to a set-off against the RTC's claim, or alternatively that it was entitled to recover on a counterclaim.[4] Under *Celotex*, however, the RTC was not required to *negate* the factual basis for petitioner's affirmative defenses, on which petitioner would have borne the burden of proof at trial, in order to prevail on summary judgment. 477 U.S. at 323. Instead, the RTC's motion "point[ed] out to the district court * * * that there [was] an absence of evidence to support the nonmoving party's case," *id.* at 325, and in addition observed that petitioner had not responded to the RTC's attempts at

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[3] As the court noted (Pet. App. A4), *Henry* also disposes of petitioner's argument (Pet. 16-17) that it was unconstitutional to apply Local Rule 11(i) where the RTC did not satisfy its initial burden under *Celotex*. *Henry* construed Rule 11(i) to require compliance with Rule 56 in the summary judgment context. 983 F.2d at 950. Thus, in granting and upholding summary judgment against petitioner, both courts in this case necessarily determined that the RTC's motion papers satisfied Rule 56 and the requirements of *Celotex*. Pet. App. A4, C2.

[4] As the district court determined (see C.A. Exe. Rec. 67), there was no substantial difference between petitioner's set-off defense and its counterclaims.

discovery of the factual basis for petitioner's set-off claim, and that the court's discovery deadline had passed. Pet. App. G3-G4. Under the circumstances, there was little more that the RTC could have done to indicate to the district court the lack of any material factual dispute on the counterclaim.

The district court therefore did not abuse its discretion in granting the RTC's motion under Rule 11(i), and the court of appeals correctly upheld that decision (Pet. App. A4) on the ground that "the RTC's papers were sufficient to support granting the motion" under the standard articulated in *Henry*. At most, petitioner's argument amounts to a claim that the court of appeals misapplied an accepted legal standard to the facts of this case. That claim merits no further review. See *Ticor Title Ins. Co.* v. *Brown*, 114 S. Ct. 1359, 1362 (1994); *Dobbs* v. *Zant*, 113 S. Ct. 835, 837 (1993) (Scalia, J., concurring in the judgment).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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